OBSERVATIONS

Upon the

LAWS and CUSTOMS

OF

NATIONS,

AS TO

PRECEDENCY.

BY

Sir *GEORGE MACKENZIE* of *Rosebaugh*,

His Majesty's Advocat in the Kingdom of *SCOTLAND.*

PETRON.

——*Hos gloria tulit Honores.*

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To the King.

May it pleaſe Your Sacred *Majeſty*,

THis *Book, having for its ſubject* Precedency, *ſhould have, for its Patron, that* KING *from whom our* Precedency *flows, as Rays do from the Sun: And beſide the nobleneſs of the Queſtions here diſcuſs'd, wherein Crowned-heads are oft-times the Clients, and Honour the Prize; Theſe Diſcourſes have the great Charms of newneſs and variety, which do ſingly ſo delight this Age, without any other advantage. I know,* Sir, *that Dedications have degenerated into Panegyricks; but why ſhould I ſay any thing of You, of whom the moſt of Your Subjects believe better things, than the moſt eloquent of Your Advocats can expreſs? It being amongſt the other wonders of Your life, that You are the beſt lov'd, though not the beſt obey'd King in Chriſtendom; the one being the effect*

of our Conviction, and the other of Your admired Clemency. And yet I might be allowed to say as much of Your *Majesties merit, as some others of* Your *Subjects; having in those many occasions I had of attending* You *upon our publick Concerns, been oftentimes both pleas'd and asham'd to find* You *understand my Trade (that great Art of Reasoning) far better than my self; discovering to me the weakness of some of my Reasons, and improving others. But what I admir'd more was, (for I admire Justice more than Wit) to find* Your *Majesty always more concern'd for* Your *Peoples Security, than for* Your *own Prerogative: So that if any Kingdom be happier than we, it is because they understand better their own Interest and not because they have a better King. Leaving then, Sir, this beaten path, I hope all wise and just men may expect, that none who owe* You *and* Your *Predecessors the Interest they have in* Your *Kingdoms and Parliaments, because of the Titles* You *have bestowed upon them, will be so ungrate and imprudent as to oppose* You, *to please a Re-publican Party, who would turn them out of all that Interest they have now in the Government, and punish them most remarkably, by levelling them with the Populace which some adore. There is not a Nobleman in these Nations, who has not been raised*

by

by the Royal Bounty; all Preferments of the Army or long Robe, being the reflex of Your *Favour upon their merit, and without which, their greateſt Parts had been at beſt, but excellent Colours lodg'd in the dark: And therefore, when they get Precedency, Preferments, Matches, or Reſpect, for being Noblemen, they ought to conſider to whom they owe all this, and to remember how little they ſignified when a Common-wealth prevailed: And if any of their Creatures us'd them, as ſome have done the Monarchy, we ſhould hear that Eloquence, which is now us'd to decry the Government and* Your *Miniſters, employed in railing againſt the ingratitude of thoſe their Creatures. Nor is it to be feared, that the Nobility and Gentry, who value themſelves ſo much upon the juſt deſcent of their Blood, will bear patiently that the Royal Line ſhould be cut, or the Succeſſion diverted from its juſt and royal Channel; ſince* Your *deſcent,* Great Sir, *has the advantage over not only all Subjects, but likewiſe over all Monarchs, that we know, when their Predeceſſors roſe from among the Vulgar; whereas, the firſt thing Hiſtory diſcovers of* Yours, *is, that they were Kings: God having wrapt up* Your *Origin in this wonderful myſteriouſneſs, as it were, to teach* Your *Subjects, that* You hold Your Imperial

Crown of Him, alone and immediatly; *and in ſhewing them how to reverence* You, *has oblieged* You *to depend upon His Divine Majeſty, the only and immediat Author, as well as Support, of Your Power and Greatneſs; and who has heap'd upon* You *ſo great, and ſo remarkable mercies, as may in letting Your enemies ſee his juſt indignation againſt them, let you alſo ſee, what ſincere and exemplary Piety He, as Your kind and omnipotent Maſter, expects from* You. *I know,* Sir, *that You will allow me to own, that I hate* Slavery, *and love Property, as well as any of our high pretenders: But, I think our Freedom and Property ſecurer under Your* Majeſty, *whoſe Right cannot be ſhaken, without the ruine of ours; it being Your great intereſt to maintain that* Law, *which makes ſo many thouſands obey* You, *in ſpight of their ambition and avarice. And I ſtill ſee, that the true Proprietar is the kindeſt* Maſter; *whereas, on the other hand, it is certain, that they who oppoſe moſt the* Government, *are thoſe who did themſelves cruelly oppreſs us under the late Uſurpers, or their impenitent Children; Thoſe, who being picqu'd at want, or loſs of* Preferment, *are acted by revenge and malice; or theſe who are ſo eaſily feol'd, as to believe thoſe who are ſuch, and who inveigh againſt Your juſt* Power, *that they themſelves may thereby be-*

become arbitrary; many of whom are themſelves greater grievances than any they exclaim againſt, and greater judgements than any they threaten. So that all we can expect is, to empty our Veins and Purſes, for the liberty of being ſold or trampled upon, as formerly, by ſuch as have neither ſo great intereſt in us, nor affection for us; whilſt You, Sir, generouſly pity what You may chaſtiſe, and ſuffer our extravagancies to grow up to be their own puniſhment. None of us can ſay, that we, or our predeceſſors have for ſix hundred years, felt the tyrannie of any of our Kings: nor can any of us deny, that all our Miſeries and Civil Wars have ſprung from the ambition and factiouſneſs of Subjects, who deſign'd indeed to govern them and us; which ſhould in reaſon make us rather jealous of our own factiouſneſs, than of our Monarchie. And therefore, Sir, That God may alwayes teach Your Subjects to be juſt to Your Merit, and to remember the laſt Age; and may make Your Miniſters careful to maintain, but not to ſtretch Your Prerogative, ſhall be the conſtant and ardent Prayer of,

May it pleaſe Your Sacred *Majeſty*,

Your Majeſties *moſt Faithfull, moſt Humble, and moſt Loyal Subject and Servant,*

GEORGE MACKENZIE.

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*** Queſt.

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Queſt.

Queſt. 43.

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Courſes taken by Princes *and* Judges, *when they intend to ſhun the deciding of Controverſies concerning* Precedency, *and to preſerve the Rights of all the Competitors.*

Errata

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Errata.

Page 13. Line 48. dele *former.* p. 14. l. 21. read the *French* words thus, *Aubaines, ſont eſtrangers nais en païs,* &c. l. *penult,* for *in the dependent,* r. *independent.* p. 16. l. 40. for *imitating,* r. *intimating.* l. 44. for *then,* r. *when.* p. 20. l. 20. r. *filiolem.* p. 27. l. 2. r. *was not then decided.* p. 31. near the foot, r. *& aliis Magnatibus.* l. *penult.* r. *ſons.* p. 39. l. 32. r. *Sineſcallo.* p. 46. l. 44. r. *his Procutor.* l. 47. for *Antoun,* r. *Aiton.* p. 69. Queſt. 11. l. 2. r. *current.* p. 74. Queſt. 17. l. 14. r. *defective.* p. 77. l. 5. r. *officium.* l. 10. dele *at the ſame time.* p. 80. l. 2. for *perceed.* r. *precede.* p. 91. l. 36. r. *unneceſſar.*

Literal faults and errours in the Pointing, may be eaſily perceived by the Reader.

OF

Advertiſement from the Author, to be ſubjoyned to the third Chapter of the *Precedency*.

BEing deſired to prove, that from Chronology it is impoſſible, that *Kenneth* 3. King of *Scots*, did row *Edgar* King of the *Engliſh* Saxons over the *Dee*; I prove it thus: *Kenneth* the 3. did not Succeed to the Crown of *Scotland*, till the Year 977. At which time, *Ethelred*, *Edgars* youngeſt Son, did Reign in *England*: *Ethelred* having begun his Reign, *Anno* 975. two Years before *Kenneths* coming to the Crown of *Scotland*. It is alſo remarkable, that *Heylen* relates, that the King of *Scotland* was ordained at the Council of *Conſtance*, to precede the King of *Caſtile*, as being one of the five abſolute Monarchs; which was inconſiſtent with his being a Tributary, or Homager Prince. This was done in Preſence of the King of *Englands* Ambaſſador, who reclaimed not, as certainly he had done, if the King of *Scotland* had been Vaſſal to his Maſter. By all which we ſee how ſolidly *Heylen* writes upon this Subject. And the learned *Speed* doth in his Hiſtory of Great *Britain* moſt Solidly, and Modeſtly, in many Parts thereof, clear us from this pretenſion; and eſpecially in the Life of *William* the Conqueror, who, to clear Marches between *Scotland* and *England*, did ſet up a Croſs at *Stranmoor*, with the Arms of *England* on the South ſide, and the Arms of *Scotland* on the North ſide; The King of *Scotland* doing only Homage for *Cumberland*. And in the Life of *Edward* the firſt, when ſome of the Great Men of *Scotland* waited on *Edward* in *Northumberland*, in the Controverſie betwixt the *Bruce* and *Baliol*; he ſayes, that *Edward* made then claim to the Superiority of *Scotland*, alledging that the Crown of *Scotland* was holden of him. To whom the *Scots* replyed, that they were ignorant, that any ſuch Superiority belonged to the King of *England*, neither could they make anſwer to ſuch things without a King, &c. And that thereupon the King delivered to them his Letters Patents, in which he acknowledged, that the coming of thoſe *Scots*, on this ſide the Water of *Tweed*, ſhould not be at any other time urged to prejudice them, for coming again into *England*; That is, (ſayes he) that their example ſhould not ſo be drawen to an Argument of King *Edwards* right over them, as if they were to come again upon Duty: So prudently jealous (ſayes this Author) were theſe Patriots of their Countries Liberty. And a little after, he acknowledges, that King *Edward* was then Plotting this Homage, becauſe *Scotland* wanted a Head. He alſo confeſſes, that *Baliol* loſt the love of the *Scots*, by the Homage he had made, and that by Letters to King *Edward*, he did afterward renounce this Homage as being contrary to his Oath, as extorted by violence, and as being made without conſent of the three Eſtates. And ſpeaking of King *Edwards* big Oath, as that he ſwore by the Lord, he would conſume all *Scotland* from Sea to Sea, if he heard any more debate in that; adds, that the *Scots* did boldly enough reply, that in this Cauſe they would ſhed their blood, for defence of Juſtice, and their Countries liberty. And further, in the Reign of *Edward* the third, he obſerves, that this ſhort lif'd pretence, was renounced by that King, who quitted *Scotland* of all claim and pretence of right to the Superiority thereof, and delivered up the Roll, called *Ragmans* Roll, wherein were contained the Names of thoſe few *Scots* who had been forced to acknowledge this Superiority.

Advertiſement from the *Printer*.

IT being objected by ſome, who are not ſo well acquainted with the methods taken by Heraulds, in handling the Art of Blaſoning, that many old Sirnames, and Noble Families of this Kingdom, are omitted, and not ſet down in the Treatiſe of *Herauldry*, and others of leſs Note inſert: To ſatisfie ſuch, It is anſwered, that the Author did never deſign, (as no other Writer on that Subject ever did) to publiſh a Regiſter of all the Sirnames and Bearings in the Nation, (Theſe being to be found in the Lyons Regiſters only) nor does he intend any advantage to ſuch as are inſert, or diſadvantage to ſuch as are left out; as not being induced to name any for inſtances of Bearings, either from the Antiquity and greatneſs of the Families, and Sirnames, or his relation and kindneſs to them, but meerly from the ſpecifick ſuitableneſs of their Armes to the ſeveral kinds of Charges and Ornaments Treated of throughout the Work.

It is to be noticed, that the obſerve made *Precd. p.* 52. *l.* 4. of a miſtake committed *p.* 42, is now unneceſſary; The Sheet wherein that miſtake was, being ſince Re-printed.

OF

PRECEDENCY.

CHAP. I.

The Precedencie of Kings and Commonwealths.

MENS Ambition, as well as Curiosity, doth breed in them a Desire to understand this Subject, which is a part of the Civil Law, and Law of Nations, exceeding as far all other parts of the Law, as Honour exceeds Money; But the same Ambition, which makes men very curious to know this Subject, will make them very unwilling to hear any thing that may decide against themselves: And so such as writ upon it run a great risque of Displeasing those whom they intended to Satisfie. But my designe being to defend and inform my own Countrey, I shall be little disappointed, though I want praise and esteem, since I do not deserve, or expect either: And he is an unworthy man, who does not think the serving his Countrey a sufficient Sallarie, for greater Pains than I have here bestowed.

Amongst those who are Supreme, Kings have the Preference from Commonwealths; and amongst Kings, the Emperour is allowed the first place, by the famous Ceremonial of *Rome*, as succeeding to the *Roman* Emperours, who are alleadged to have been Universal Monarchs; Because in Scripture they are said to *have taxed the whole world.*

And therefore the *German* and *Italian* Lawyers, who are ſubject to the Empyre, have with very much Flattery, aſſerted that the Emperour is the Vicar of GOD in Temporals, *Bald. in l.* 1. *c. de Jure aur. an.* And that Juriſdictions are derived from him, as from the Fountain; calling him, *Dominum & Caput totius Orbis*: And for this they do very impertinently cite ſeveral Texts of the Civil Law, which being Laws made by the *Romans* themſelves, cannot bind or prove againſt other Nations. Nor is the Tranſlation of the old *Roman* Dignity upon *Charles le maigne* by *Leo* the 3. of greater Authority, amongſt ſuch as acknowledge the Pope to be no infallible Judge. And whatever may be debated againſt other Kingdoms, which were once Subject to the *Roman* Empyre; Yet his Plea againſt *Scotland* is very ill founded, ſince in the opinion of *Scalliger*, and the beſt of Hiſtorians, *Scotland* nor its Kings were never ſubject to the *Roman* Empyre, nor conquered by them; for they, to defend themſelves againſt the *Scots*, were forced to build a Wall, called *Vallum Adriani*, which is Extant to this day as an undenyable Proof, that *Scotland* did ſet Limits to the *Roman* Empyre: And thus as *Scalliger* obſerves, *Romani Imperii fuit olim* Scotia *limes.*

It is likewiſe pretended by the *German* Lawyers, that the Emperour ought to precede all others; becauſe he is crowned with three Crowns, one of Iron at *Aquisgrane*, one of Silver at *Milan*, and one of Gold at St. *Peters* Church, *Gloſs. ad Clement.* 1. And ſince the King of the *Romans* who is but Emperour in hope, debates with other Kings, as in *anno* 1533. he who is actual Emperour, ought to be preferred to them.

For the Emperour it is alſo pretended, That in the *Ottomon* Court, and in all other Courts, the Emperours Ambaſſadors are ſtill preferred, and that he only is ſtill ſtyled, *your Majeſty*, in all Adreſſes made to him by all other Kings, as by *France*, *anno* 1628. by *Pole*, *anno* 1621. *&c.* And that the Kings of *Pole*, *Sweden*, *Denmark*, and others have taken Confirmations from him, *& ab eo petierunt veniam ætatis*, *Hering. de fidejus. c.* 2. And yet the Kings of *Britain* and *France* may debate the precedency with him, becauſe the Empyre is but Elective, whereas they are Hereditary, the Empyre is a Limited, but they have Abſolute Monarchies, *vide Peregrin. de jur. fiſc. tit.* 1. *num.* 47.

The *French* King debates his precedency with the King of *Spain*; the *Spaniard* contending that he ought to be preferred, becauſe he is the moſt Catholick King, and King of manieſt Kingdoms; and ſome of them are ſo fooliſh as to ſay, That the *Spainiſh* Nation is more ancient than the *French*, as owing their Origin to *Athamaricus*, one of the firſt Governours amongſt the *Goths.* But for the *French* it is anſwered,

1. That they are the moſt Chriſtian Kings.

2. That they are Conſecrated and Anoynted.

3. That *Swardus* was firſt King of that Nation, in the Reign of *Alexander* the Great.

4. That they were preferred in many General Councils to the *Spaniards*, as in the *Lateran* Council, *anno* 1215. in the Council of *Conſtans*, *anno* 1416. and in the Council of *Baſil*, *anno* 1433. That the *Venetians* preferred the *French* after much Debate, *anno* 1558. the Caſe being ſubmitted by both to that Senate; and *Pius* the IV. preferred him at *Rome*, *anno* 1564. the King of *Spain* having appealed from the *Venetian* to him.

And

And though the Emperour has of late decided in favours of *Spain*, yet that Deciſion is little conſidered, becauſe of the Relation which the Emperour has to the *Spainiſh* Crown; And therefore the *French* King does very wiſely ſend only Envoys and Reſidents to the Imperial Court, leſt if he ſent Ambaſſadours, the *Spainiards* might be preferred to his. Nor was this Precedency ever acclaimed by the *Spaniard*, till the Reign of *Charles* the V. who being both Emperour and King of *Spain*, did begin this Debate; which after many Conteſts, the *Spainiard* has at laſt ceded, having commanded his Ambaſſadour, the Marqueſs *de la Fuente*, to acknowledge the ſame to the moſt Chriſtian King, in Satisfaction of the Injury done to his Ambaſſadour, in *anno* 1661. at *London*.

The King of Great *Britain* founds his Precedency to both, upon 1. His being King of that Iſle, which was firſt Chriſtian. 2. Upon his being Anointed, and one of the *quatuor Uncti*, which were before all other Kings. 3. That having conquered *France*, in the time of *Henry* the V. he has Right to all the Precedency which *France* can acclaim. And to *Spain*, the King of *England* was preferred in the General Councils of *Piſa*, *Conſtans*, and *Baſil*. I find likewiſe in *Golſtad. lib.* 1. *cap.* 30. That Pope *Julius* the II. decided, after debate, in favours of *Henry* the II. King of *England*, againſt *Ferdinand* the V. *Caſpar. Ens. theſaur. polit. part* 3. *apot.* 63. And therefore in the Book of *Roman Ceremonies*, 1504. *England* was placed before *Caſtil.* nor can it be denyed, but that *Charles* the V. in ranking the Knights of the *Golden Fleece*, did give the right hand to the King of *England*, and the left to the King of *Spain*. And though of late the Court of *Rome* has decided in favours of *Spain*, yet that proceeds from the diſlike that *Rome* had to *England* for its Separation, and the great Eſteem which dayly grows there for *Spain*; becauſe *Spain* has never indulged any who have left the Romiſh Church.

CHAP. II.

Of the Precedency due to the Kings of SCOTLAND.

I Muſt here crave Leave to ſay, That the King of Great *Britain* may juſtly claim the Precedency from all thoſe Kings, as he is properly King of *Scotland*. For it is an uncontroverted Ground in Law, *That amongſt thoſe of equal Dignity, he, who firſt attained to that Dignity, is to be preferred*, *L.* 1. *C. de Conſul. Quis enim prior eſſe debet in eadem genere Dignitatis, niſi qui prior eum adeptus eſt*, *L.* 1. *ff. de albo ſcribendo.* With which agrees the Canon Law, *Cap.* 1. *de major. & ob.* And this is declared the uncontraverted Teſt of Precedency, by *Crus. de jur. preced. pag.* 66. *Menoch. concil.* 51. *& Cuj. ad L.* 2. *C. de Conſul.* And

we ſee that this Rule holds in all other Dignities, without reſpect to Riches, or multitude of Poſſeſſions: And thus amongſt Dukes or Earles in all Nations, the firſt who attained to the Dignity, is ſtill preferred; though others be much richer, and have ſuceeded to moe Earldoms.

This being then the true and ſolid Ground of Preference, I may truly ſubſume, That the King of *Scotland* being equall in Dignity, with the Kings of *England*, *France*, and *Spain*, attained to that Dignity, before either of theſe. For our King *Fergus* came into *Scotland* 330. years before the birth of CHRIST; Whereas *Polydor* an *Engliſh* Hiſtorian, confeſſes that *Egbert* the firſt King of *England*, did begin his Reign eight hundred years after our Saviours birth, and the King of *Scotland* marryed the daughter of *Ambroſius Aurelius*, who was the firſt King of the *Britans*, and whoſe Reign preceeded the Origin of the *Engliſh* Kingdom.

As to the Monarchy of *Spain*, and their Race of Kings, they are no older than *Rudolphus* King of the *Romans*, elected in the year 1273. by whom the houſe of *Auſtria* did riſe to this Dignity.

As to the Kings of *France* who now Reign, they are only deſcended from *Hugh Capet*, who uſurped that Throne in *anno* 987. And not being deſcended of either the *Carolovingian* or *Merovingian* Races, they cannot compet with our Kings, *Achaius* King of *Scotland* having been contemporary with *Charles le maigne*, the firſt of the *Carolovingian* Race; and yet *Achaius* was but the 65. of our Kings, and the Leagues betwixt *Achaius* and the ſaid *Charles*, are aſſerted not only by our Hiſtorians and the *French*, but confeſſed by all Strangers.

To evite this Argument, ſome Hiſtorians have of late aſſerted, that we had no Kings before *Fergus* the II. and *Cambden* obſerves, that the *Scots* were unknown till the dayes of *Conſtantine* the great, which is a moſt unjuſt and groundleſs Calumnie; ſince four Monaſtries of our Nation, *viz. Melroſe*, *Pluſcarden*, *Paiſley* and *Scoon*, did keep conſtant and diſtinct Annals of all that paſt in this Nation, after the Eſtabliſhment of the Chriſtian Religion, which was in *anno* 199. and have tranſmitted to us what was delivered to them, by the pious and remarkable Chriſtians of thoſe firſt Ages of the World, who, as they were eye-witneſſes of what paſt ſince our Chriſtianity, ſo are not to be preſumed to have recorded any thing of what preceeded their own age, without ſufficient Warrand: And as it is incredible, that ſo Sincere and Pious men would have lyed, ſo it is not imaginable, that ſo many Societies would have conſpyred together, in a whole Tract of ſo circumſtantiat a Hiſtory as ours is; and there can be nothing brought to convell the Faith of ſo large a Hiſtory, but what may, with the ſame force, be urged againſt the whole *Roman* Hiſtory, few or none having related what is ſaid in the *Roman* Hiſtory, beſides the *Romans* themſelves: Whereas *Galdus* (or as *Tacitus* names him, *Galgacus*) oppoſed *Agricola* under *Domitian*; and that he was a *Scot*, is clear by *Lipſius* Notes upon that Place, *Egregium membrum, & quatta multa in corpore hujus Orationis Galgaci Scoti*: But the Text makes this moſt clear to me, for this Diſcourſe is ſaid to have been made, *ad montem Grampium*, which is known to be a *Scottiſh* Tract of Hills, dividing the North and South of *Scotland*. *Hegeſippus*, who lived in the dayes of *Hadrian* the Emperour, and ſo an hundred and ten years before *Conſtantine*, does write of the *Scots* as a warlike People, to whoſe Authority

Cambden

Cambden can make no anſwer, but that he contraverts the Authority of the Tranſlation or Impreſſion; by which anſwer, all Antiquity may be confounded; and ſeing that Tranſlation was the work of St. *Ambroſe*, it cannot but be above all cenſure. *Claudian* does make the Scots to have Reigned in the dayes of *Honorius*, for in his ſecond *Conſulat* he has,

——— *Scotumque vago mucrone ſequutus*
Fregit Hiperboreas, remis audacibus, undas.

And in another place he ſayes,

Scotorum cumulos flevit glacialis Iernæ.

And *William* of *Weſtminſter* confeſſes, That we came into *Britain* in the 77. year after CHRIST: *Beda* likewiſe another *Engliſh* man, makes us to have been in this Iſle, before the dayes of *Julius Cæſar*. And as it cannot be denyed, that we were ſtill ſubject to Monarchy, ſo no Hiſtorian can pretend, that we obeyed any Race, ſave that which now Reigns: Whereas we can condeſcend, where the *Engliſh* and *French* were conquered by Strangers, and had their Royal Line dethroned, and inverted.

Another Ground of Precedency may be adduced for the King of *Scotland*, from his being the undoubted Lineal Suceſſour of 110. kings: whereas the Lyne of *France* runs no higher than *Hugh Capet*, who lived in *anno* 987. and did in that time dethrone the former Race: The kings of *Spain*, are only deſcended from the Counts of *Tierſtiem*. And the preſent kings of *England* are deſcended from *William* the Conquerour. So that whatever may be pretended for the Antiquity of thoſe kingdoms, yet their kings are not ſo ancient as ours: and Precedency ought to be given, amongſt Equals, to the Eldeſt Race, and not to the eldeſt Kingdom. In ſuch Dignities, the preference muſt be given, either according to the Antiquity of the People or Countrey, or Race which Reigns there. If the Countrey be conſidered, there can be no Precedency acclaimed by any; for as all countreys were created at the ſame time, ſo none can know which of theſe kingdoms were firſt inhabited: and that none can be preferred upon the Antiquity or Riches of their countrey, is clearly determined by Lawyers, *Regionis, Locique, cui Principes præſunt, ratio, & ſic de eorum locorum præſtantia, veterum elogia necquicquam ad præcedentiam faciunt, Gothofred. de præced. cap. 3. num.* 30. If we conſider the Antiquity of the People, who are commanded, though that could give Precedency to them, or to any who repreſented them, yet that ought not to give precedency to the king; for, *principum precedentia metienda eſt ex ſua dignitate, non extra:* And the Learned *Speronius Speronii*, hath proved this in a large Diſcourſe, written in the *Italian* Tongue; but if this be conſidered as a ground of precedency, then we ought to be preferred to the *Engliſh*; for we are ſtill the ſame People and Nation, but the *Engliſh* are not the old *Britans*, but are a mixture deſcending from *Danes*, *Saxons*, and *French*: And ſo we being the Eldeſt People, our King ought to have the precedency upon that account. Even as our king was preferred to the late kings of *Jeruſalem*, though they commanded the people who now live in *Judea*, and who came in place of the ancient *Jews*, a kingdom very ancient formerly. But the Antiquity of the Race that Reigns, is the ground of precedency: For this reaſon it is, that the elder brother ſucceeds, without reſpect to the Greatneſs of Eſtate,

or Antiquity of thoſe whom he commands. And though theſe conſiderations give preference *inter impares dignitate*, yet *inter pares dignitate*, *familia quæ prior dignitatem eſt adepta*, *ſemper præferenda in incedendo*, *ſedendo*, *&c. Menoch. conſil.* 902. *num.* 57. *Rebuff. ad l.* 1. *c. de conſul. Platea ad l.* 2. *c. ut dignit. ordo.* And ſince it ſhall be proved, even from Forreign Hiſtories cited in this Chapter, that we had Kings before any of the Races now Reigning in either of theſe, our Kings ought to be preferred to them.

Since Chriſtianity was eſtabliſhed, Chriſtian Princes have been preferred according to the date of their having received the Chriſtian Faith, *Gothofred. de jur. præced. cap.* 3. *num.* 23. *Grotius de jur. bel. lib.* 2. *cap.* 5. and that is the chief Ground of Precedency obſerved in the Court of *Rome*, and eſpecially in general Councils; but I conceive it ought not to be a Ground of Precedency any where elſe, ſince amongſt Equals, the Antiquity of Blood ought to be preferred to the date of Chriſtianity; Chriſtianity rather diſcharging all Care for Precedency: But even according to this Rule, the eldeſt Chriſtian Race ought to be preferred, Religion having ſtill Reſpect to Chriſtian parents; whereas on the other hand, it is of no advantage to any perſon, that he ſucceeds to an Eſtate which was formerly poſſeſt by Chriſtians, theſe having no Connection with one another: and a man ſhould by the ſame Rule be preferred, becauſe he dwells in a houſe where Chriſtianity was firſt profeſſed, which were in it ſelf very ridiculous: And if the firſt Chriſtian Race be allowed the Preference, the King of *Scotland* ought to be preferred; for *Donald* King of *Scots* imbraced the Chriſtian Faith in *anno* 199. before either *William* the Conquerour ſucceeded to *England*, or *Hugh Capet* to *France*, and long before *Spain* obeyed this Race of Monarchs; for which we can cite not only our own Hiſtorians, but *Baronius ad annum* 449. *Ducheſne*, and many others, and particularly *Beda* and *Polidor*, the worthieſt of *Engliſh* Hiſtorians. *Beda* relates, That *imbuebantur a Scotis parvuli Anglorum*, *quin & ipſe Alfridus Anglorum Rex*, *in Inſulis Scotorum operam dedit*, *& ſacras Literas didicit*, *lib.* 3. *hiſt. c.* 27. *Reges Angliæ cupidi ſalutis æternæ*, *Legatos ad Eugenium quartum Scotorum Regem miſerunt*, *ut ille digneretur Viros idoneos mittere*, *per quos illi Chriſtianæ Fidei Rudimenta docerentur*, *& ſacro Baptiſmatis fonte abluerentur*, *quod ille haud gravate indulſit.* Which clears fully, that our Kings were Chriſtian before thoſe of *England*, and ſo ought to be preferred to the Kings of *England*, by their own Arguments, and their own Authors.

King *Donalds* Converſion is atteſted by *Bellar.* in his Anſwer to King *James*, by *Barronius*, *ad annum* 429. *Sanderus lib.* 4. *de clæv. David Arnoldus de converſione Gentium*, *&c.* And ſince King *Donald* was before *Fergus* the ſecond, it appears clearly, even from Forreign Hiſtories, that we had Kings before *Fergus* the II..

I cannot deny, but that in the Council of *Conſtans*, *England* and *France* were preferred to *Scotland*: but that proceeded, as *Gothofred.* obſerves, from the partiality of the Church of *Rome*, which alwayes preferred thoſe who were able to do them moſt Service; but if we conſider the Principles of the Chriſtian Religion: according to theſe, that Race ought to be preferred, whoſe Title is juſteſt; and I am ſure, that according to this Rule, *Scotland* ought to be preferred, for its Kings have not Uſurped over the People which they Governed. And not only does Religion conſider this

ground

ground of Preference, as ſuteable to Devotion; but the Law conſidereth it, as ſuteable to Juſtice: And Lawyers have therefore thought a Succeſſion of Kings, enjoying a juſt Title, free from Violence and Tyrrany, one of the chief Grounds of Preference and Precedency. And thus *Vaſquez. in præfat. ad illuſtres queſtiones*, ſayes, That *multum ad nobilitatem & prælationem confert, ex veris & legittimis Regibus, & non a Tyrannis deſcendiſſe.*

Nor does the Cuſtome either of Courts or Councils, invert the Precedency which is founded upon Antiquity, and the right of Blood, from which Conſuetude cannot derogat in the matter of Precedency, ſince that Conſuetude is only reſpected in Law, *quæ in ſe rationabilis juri nec naturæ nec gentium contrariatur:* And likewayes ſince this matter of Precedency is ſetled by Lawyers, upon theſe ſolid Foundations, for ſecuring the publick Peace and Intereſt of mankind, it were unjuſt that the ſame ſhould be ſo eaſily overthrown by the Partiality of Intereſted Church-men, or the Pride and Power of other Competing and Rival Princes; and therefore to ſecure the Rights of Juſtice and Blood, againſt all ſuch Invaſions, Lawyers have unanimouſly concluded, that *Conſuetudine induci non poteſt ut prior in dignitate præferatur poſteriori, Cruſ. de præemi. cap.* 12. Which Principle they ſo farr aſſert as to conclude, that this could not be conceded even by expreſs Paction, *Rumellin. diſſert.* 1. *theſ.* 18. even though that Paction were confirmed by an Oath, *Rippa. ad l.* 3. *ff. de donat.* And albeit it may ſeem that every man may renounce that which is introduced in his own favours; yet to this it is anſwered, That men cannot renounce what is introduced in their own favours, when that which they renounce was not principally introduced in their favours, but aroſe to them neceſſarily, by the Laws of Nature and Nations, or was introduced principally, in favours of the common intereſt of Mankind, rather than of them, and in which, third parties would likewiſe be concerned: All which is clear not only by the principles of Reaſon, but by *L.* 3. *ff. de pactis*, and it cannot be denyed, but that the Precedency from the Antiquity of blood, is no ſuch private Right as may be renounced, it being a priviledge not given by Law, but ariſing from nature, *Lex non data, ſed nata*, and introduced for regulating the common Intereſts of mankind, and preventing their differences or oppreſſions; whereas how unfortunate or irregular ſhould men be? if ſubjects might force their Magiſtrates, or younger brothers the Elder, or ſtronger Princes the weaker, to Renounce by Paction, or might ſcrue from them by Cuſtom and Inadvertance, the Seniority and Precedency due to them; whereas now, the impoſſibility of prevailing in ſuch Deſignes, takes happily away all luſting after them, and whatever may be aſcribed to Conſuetude or Deciſions in that Precedency, which becauſe it ſprung meerly from Cuſtome, may be regulated by it, or in dubious Caſes, where a grain weight may caſt a ballance; yet I ſee no Law nor Reaſon that can be adduced, for taking away by Deciſions, Negligence, or Conſuetude, a clear right of Precedency, founded upon the Antiquity of Blood. Eſpecially ſince all who writ upon precedency are clear, That no man can prejudge his Succeſſors, as to the precedency due to them by blood, *Licet poſitus in dignitate ſuo ipſius facto, poſſit ſibi prejudicium afferre, non tamen præjudicare poteſt quoad ſucceſſores ſuos, Dec. conſil.* 21. *num.* 74. *vid. Gothofred. de præced. pag.* 55. *Rub. deciſ.* 298. *qui tradit ea quæ a genere & natura tribuuntur, non obſtante facto majorum ma-*

nent incolumia. Which Rule ſhould rather hold in Kings than in any elſe, becauſe they are but Adminiſtrators. But in this caſe, there is no Deciſion againſt our Kings, nor have they ever conſented to any ſuch preference: And therefore whatever may be ſaid for others, againſt them, in a poſſeſſory Judgement, the matter of Right is ſtill intire.

Vaſquez. the illuſtrious *Spaniſh* Lawyer, did, at the Council of *Trent*, adduce ſeveral Arguments for the precedency of the king of *Spain*, which, if they were well founded, would I confeſs, inferr a Precedency to *England* and *France*, and which I ſhall the willinglier adduce and anſwer, that I have heard them urged for *France* and *Spain*, againſt the King of *Britain*; and becauſe they are the generall topicks and common places, which are neceſſary to be known, and underſtood for clearing not only the Precedency of Princes, but even of the Nobility and Gentry.

The firſt is, That theſe who are moſt powerfull and greateſt, ought ſtill to be preferred, *c. ſtatuimus de major. & obed.* and he muſt be accounted moſt powerful, who is moſt powerfull, the time of the debate: *Nam qualitas adjecta verbo, debet intelligi ſecundum tempus verbi, l. in dilectis § ſi extraneas ff. de noxalibus.*

The ſecond is, That thoſe who command the nobleſt and beſt Subjects, are accounted the nobleſt and beſt, *Authent. de defenſoribus civitatum § nos igitur.*

3. Riches are the riſe and occaſion of Dignity, and therefore are the chief grounds of precedency amongſt Equals.

4. He is to be preferred in Dignity, whom generally men eſteem the greateſt.

5. Since Honour is the Reward of pains, and dangers, thoſe who take moſt pains, and are lyable to moſt dangers for Chriſtendom, and the Chriſtian Faith, ought to have the precedency, in Chriſtendom, and amongſt Chriſtian Princes: And that pains and dangers are grounds of precedency, is urged from *l. ſemper § negotiatores ff. de jur. immunitat.*

6. As all Goodneſs is the Nobler, the more communicative it be, ſo theſe muſt be concluded the Nobleſt, by whom moſt people have advantage: and therefore theſe Kings, under whom Trades flouriſh moſt, and who beſtow Sallaries upon, and give a livelyhood to moſt men, ought by Mankind to be preferred.

To all which Arguments it is anſwered, that if preference were to be given by choice, and did not deſcend from the Right of Blood and Antiquity, then the former Arguments were indeed conſiderable, and ought to direct the Electors; but where the Antiquity of Blood can be inſtructed, it ſtill gives precedency, as is clear from the Authors above cited. And thus though we do confeſs, that the Kingdoms of *France* and *Spain*, and particularly the kingdom of *England*, are Richer, Greater, and more Conſiderable upon theſe Accounts, than *Scotland* is; yet ſince the Race of our Kings is more Ancient than either of theirs, I conclude, That therefore they ought to be preferred.

CHAP. III.

That the Crown *of* Scotland *was not ſubject to* England.

SOme *Engliſh* Hiſtorians, Lawyers, and Heralds, do too frequently abuſe the World with a moſt Groundleſs Tradition; by which they contend, That the Kings of *Scotland* were Vaſſals to the Kings of *England*, and did them Homage for the Crown of *Scotland*: Which if it were true, would have taken from the Kings of *Scotland*, not only the Precedency, for which I have been debating, but would have placed them after the Kings of *Caſtile*, and many others to whom they were preferred. And therefore, not only to remove this Objection, but to free my Country from this moſt unjuſt Imputation, I am Reſolved (with very much Reſpect to the *Engliſh* Nation, whoſe Wit, Courage, and Learning, I very much eſteem) to inform the Curious, how unjuſt this pretence is; and to which I have been not only inclined, but forced, upon the Reading of a Rapſodie printed lately, by Mr. *Prin*, *in Vindication* (as he ſpeaks *pag.* 487.) *of the Dominion of the Engliſh Kings*, *againſt the Ungrate*, *Perfidious*, *and Rebellious Kings of* Scotland. In which none of the Learned or Diſcreet *Engliſh* are concerned, ſince I find none who deſerve that praiſe, engaged in this Debate, which has been agitated only by ſuch of that excellent Nation, as have had more Humor than Diſcretion. I deny not, but that the Kings of *Scotland* did hold the Lands of *Northumberland*, *Cumberland*, and *Weſtmerland*, *in capite*, of the Crown of *England*, and that they did them Homage for it, which was not Diſhonourable to *Scotland*, that being moſt ordinary amongſt Soveraigne Princes: For thus, *Henry* King of *England*, and ſeverall others of their kings, did Homage to *Philip*, and other kings of *France*, for the Provinces poſſeſt by them in *France*; and the king of *Spain* does at this day Homage yearly to the Pope, for *Naples* and *Sicily*. And yet the Homage done for theſe Countrys, has been the occaſion of an ignorant Miſtake in ſome, and a malicious pretext for others, to miſrepreſent the Homage done for theſe Counties, as done for the Kingdom of *Scotland*. And the Occaſion of getting theſe Provinces from *England*, is too Honourable to be denyed by us; it being moſt undenyable, That the *Scots* being called in to aſſiſt firſt the *Britans* againſt the *Romans*, and thereafter the *Saxons* againſt the *Danes*, they had theſe provinces beſtowed upon them, as a Reward of what they had done, and an Encouragement to them to continue their Friendſhip for the future. And by a Statute made by St. *Edward*, and ratified by *William* the Conquerour, as *Holinſhed* obſerves, the *Scots* were for that Service likewiſe Naturalized *Engliſh*, for which Naturalization that Statute gives two Reaſons, one, *quia omnes ferme* Scoti

Proceres ex Anglis *conjuges cæperunt*; *& ipſi rurſus ex Scotis*; and the other was, *quia ſimul & in unum contra Danos, & Norvegos atrociſſime pugnaverunt.* But that the kings of *Scotland* did hold the Crown of *Scotland*, as Vaſſals of *England*, or did Homage to the kings of *England* therefore, will appear to be moſt falſe from the following Arguments; which muſt not be tryed by the Law of *England*, but by the Civil and Feudal Laws, which are now become the Laws of Nations, and are reverenc'd as the ſole Judges in all Differences betwixt Nation and Nation, and which muſt be preſumed equal to both Nations, ſince made by neither.

1. All Lands are preſumed to be free from Servitude, except the Servitude be clearly inſtructed; but much more are all kingdoms preſumed to be free, ſince *ex natura rei*, kings and kingdoms are independent, *& qualitas quæ ineſſe debet, ineſſe preſumitur*,; and by how much the preſumptions are ſtrong, by ſo much ought the probation, which elids them be the ſtronger. And albeit all Domeſtick proof ought to be rejected in all caſes, as ſuſpect and partial; yet the *Engliſh* can adduce nothing, for obtruding this Servitude upon us, ſave the Teſtimonies of their own Hiſtorians, Lawyers, and Heralds.

2. The Natural and Legal way of proving any man to be a Vaſſal, is by production of the Feudal Contract, betwixt the Superiour and Vaſſal; all Feus requiring neceſſarily writ in their Conſtitution: Nor can Vaſſalage be legally prov'd otherwiſe; whereas here the *Engliſh* can produce no formal, nor original Conſtitution of this Fue; ſuch as is to be ſeen betwixt the Pope, and the King of *Spain*, the Emperour, and the Princes of the Empyre, *&c.* For all they can adduce, is only poſteriour acknowledgements of this Vaſſalage, *via facti*, which is but a begging of the queſtion; and theſe, being but Acceſſories, and Conſequential Inferences, cannot ſubſiſt, except the original Conſtitution be firſt proved, no more then the payment of Feu Duties to a Superiour, either by Force, Ignorance, or Miſtake, could prove the Payer to be Vaſſal for the future, except the originall Feu were produced: And as this is neceſſary in Law, ſo it cannot be imagined in Reaſon, but that ſome Obligation in Writ, or Feudal Contract, would have been taken by the *Engliſh*, who were a very wiſe people, and conſulted very prudently their own Securities in every thing elſe: And if this Contract had been once entred into, it had been yet extant, ſince the *Engliſh* cannot alleadge, that ever they loſt any of their Monuments, or Records: And it is clear that we had Charters for theſe Lands we held in *England*, and that *England* had Charters at the ſame time, for the Lands they held in *France*: And it is very obſerveable, that in the Reign of King *Edward* the 1. that King ſtiles himſelf, *Rex, & ſuperior Dominus Regni Scotiæ*, during his violent Uſurpation over *Scotland*; whereas never any King of *England* did ſo formerly: And yet, if they had had any ſuch pretenſions, they had aſſumed the ſame Titles; but this imaginary Title began, and ended with the Force, which only maintained it.

3. The *Engliſh* cannot condeſcend upon any Reaſon, which might have prevailed with the *Scots*, to have become Vaſſals to *England*, nor any particular time when they firſt became Vaſſalls; and all they can alleadge is, That upon ſome impreſſions of Force, ſome of our own Kings being priſoners, or ſome of our people being oppreſt, they did elicite from them acknowledgements of a Vaſſalage, formerly ſtated: Whereas Force, renders all acknow-

acknowledgements null; and that theſe acknowledgements were null upon many other Accounts, and that the Kings of *England* have been forced, to grant the like to other Princes, ſhall be proved clearly, in anſwer to the Inſtances which the *Engliſh* adduce.

4. *Scotland* has been habite, and repute, and acknowledged to be a free Monarchie, and their Kings Independent and Supreme; and that not only by all Forreign Princes, (the beſt Judges in this Caſe) who have received and preferred their Ambaſſadours, as the Ambaſſadours of free Princes, but even in General Councils, the King of *Scotland* has been preferred to the Kings of *Caſtile*, *Hungary*, *Pole*, *Navarr*, *Cyprus*, *Bohemia*, *Denmark*; and thus they were ranked by Pope *Julius* the II. *anno* 1504. *vid. Beſold. ſinop. doct. politicæ. lib.* 20. *cap.* 10. Which could not have been done, if he had been only a Feudatory Prince; ſince all free princes, are preferred to all feudatory princes: Yea, and if *Scotland* had been Vaſſals to *England*, for the Crown of *Scotland*, the Kings of *England* had certainly craved, and obtained the precedency from other Kings upon that account, ſince he had been *Rex Regum*. And ſince *France* craved to be preferred to *Spain*, becauſe the king of *England* was his Vaſſal, as *Chaſſanæus* obſerves, *part* 5. *conſider.* 19. ſo much rather ought the Kings of *England* to have been preferred; becauſe they might have alleadged, that there was a Crown holden of them, whereas they held only ſome Feu-Lands of the kings of *France*.

5. Not only Chriſtian Princes and Councils, but even Popes have declared *Scotland* to be a Free Kingdom, and Independent from *England*. And thus Pope *Honorius* allowed to *Scotland*, That its Subjects ſhould not be obliged to anſwer, by way of Appeal, to any Court without their own Kingdom, *ſalva ſolummodo authoritate ſedis Apoſtolicæ*. 2. *Edward* king of *England* having petitioned Pope *Innocent* the IV. that the Kings of *Scotland* might not be Anoynted or Crowned, without his Knowledge, *quod non poſſet ſe facere, ipſo inſcio in Regem coronari vel inungi*, the ſaid Pope did refuſe the ſame, *preſentibus procuratoribus parium in Conſilio Lugdunenſi, ſatis per hoc determinans Regnum* Scotiæ *Regno* Angliæ *non ſubeſſe*. 3. The King of *England* having likewiſe petitioned the ſame Pope *Innocent*, that he might have Liberty to Collect the Tiths of *Scotland*, ſince he had Right *terrarum omnium ſuæ juriſdictioni ſubjectarum*, the ſame was alſo refuſed. 4. Pope *Boniface* the eight, does in a Letter to *Edward* king of *England*, Declare, That *ad celſitudinem regiam potuit perveniſſe, qualiter ab antiquis temporibus, &c. quodque Regnum* Scotiæ (*ſicut accepimus*) *a progenitoribus tuis, Regni* Angliæ *Regibus feudale non extitit, nec exiſtit, &c.* The copy of which Letter I have at preſent. And *Ducheſne* writing the Hiſtory of Great *Britain*, does, *pag.* 661. relate, That *le meſme Pape renvoya d' autres Lettres au roy d' Anglterre, pour ſouſtenir que le royaume de Escoſſe ne dependoit point d' Anglterre, & que contre le droit Divin, & la juſtice il s' en vindicoit la ſubjection*. That is to ſay, *The ſame Pope ſent Letters at the ſame time, to the King of* England, *in which he maintained, That the Kingdom of Scotland was no way ſubject to that Kingdom, and that his ſeeking to ſubject it to him as ſuperiour, was contrare to the Law of GOD and Men.*

6. By the Feudal Law and Law of Nations, a Vaſſal cannot Mortifie any part of his Feu, without the conſent of his Superiour; becauſe the Superiour, by the Mortification, looſes the Services due to him out of his

Feu, Church-men being obliged to no *reddendo*, but *Præces & Vota*: And therefore in all Mortifications made by Vaſſals, the Superiours Confirmation is ſtill required; and it cannot be imagined, but that if *Scotland* had been a Feu holding of *England*, the Popes, their Conclaves, and the Monaſtries themſelves, would have ſought Confirmations from the Kings of *England*, of the Mortifications made by the Kings and Subjects of *Scotland*, there being more Erections of that kind in *Scotland*, than in any Nation of equal Revenue; and yet never any ſuch Confirmation was ſought or pretended to: But on the contrare the Pope ſtill confirms theſe Erections, as made *per Reges Scotiæ*, as he does in all other Nations, or the Kings of *Scotland* confirm theſe Erections, if they be made by any of his Vaſſals: and it is obſervable, that the Pope does in theſe Confirmations deſigne our King, *Regem Scotiæ*, and not *Scotorum*.

7. The Hiſtorians alſo of other nations, did concurr with thoſe of our Nation in aſſerting this freedom; and thus *Arniſæus*, the beſt Lawyer who has writ upon theſe politick queſtions, does look upon this pretence, as a meer fiction, *lib. 1. cap. 5. Anglus Scotorum regem habebat ſibi fiduciarium ſive ratione aliquot regionum, ſive ratione ipſius regni, ut nimis audacter aſſerit. Math. Steph. Nam hæc vetuſtate temporis, & obſcuritate authorum ſunt incerta.* And *Ducheſne pag.* 21. ſpeaking of *Scotland*, aſſerts poſitively, That its Kings does recognoſce no Superiour but GOD, and is every way a Soveraign Prince, notwithſtanding of the old pretentions of *England*, *Le Roy le poſſede en toute ſouveraineté ſans recognoiſtre au cun ſuperieur que dieu, bien que c' eſtoit ancienne prætenſion des Anglois, que le Roy D'eſcoſſe eſt vaſſal de lenr couronne.*

8. Not only have forreign Princes, General Councils, and the Lawyers and Hiſtorians of other Nations, declared *Scotland* to be a free Kingdom, but even the Kings of *England*, have acknowledged this freedom, and independency; as may appear by theſe inſtances. 1. The King and Parliament of *England*, have treated with the Ambaſſadours of *Scotland*; whereas no Superiour can treat with his own Vaſſal, as a forreigner; nor can a Vaſſal ſend Ambaſſadors to his Superiour; for an Ambaſſadour muſt be equal to him, to whom he is ſent, and is, in Law, no way lyable to his Jurisdiction. And this is, amongſt others, the opinion of *Alberic. Gentil.* an *Engliſh* Lawyer, *de Legationibus l. 2. c. 10.* And it is clear from *Liv. lib. 6. & lib. 43.* 2. King *Henry* of *England*, being to enter upon a War with *Simeon*, Earl of *Leiſter*, did intreat Supply from *Alexander* King of *Scots*; and leſt this might inferr any Acknowledgement of his Superiority, he did by Letters under his hand, and by his Ambaſſadours publickly declare, that he did not crave this aid as Superiour, to which Superiority he had no pretence. 3. The ſame King *Alexander*, being invited to aſſiſt at the Coronation of King *Edward*, and being unwilling to go there, leſt it might inferr an acknowledgement, King *Edward* did declare, *Quod non ex Debito, ſed ex Gratia tantummodo hoc petebat.* 4. The ſame King *Alexander*, being to make homage in *England* to king *Edward*, for the Lands of *Penrith* and *Tindale*, which he held of king *Edward*, he did publickly proteſt, *Quod non pro Regno Scotiæ, ſed pro terris in Anglia, dictum Homagium faciebat; Rexque iſte Angliæ hujuſmodi Homagium admiſit: per quod præſumitur taliæ ſuiſſe, & ſimilia prius facta homagia, Regno Angliæ per Reges Scotiæ: Nam taliæ ſuiſſe præſumitur, quale fuit illud declaratum & expoſitum Homagium; nam talia ſunt ſubjecta, qualia prædicata admittunt.*

Which

which are the very Words uſed in the Anſwer made by the *Scots*, before the Pope, where all the former four inſtances are fully diſcuſſed, and were offered to be proved by Witneſſes, beyond all Exception; the Writs themſelves having been deſignedly taken away by king *Edward*. And *Fordon* has in his Hiſtory, unprinted Copies of ſeveral Letters, written by the ſaid Pope *Boniface* and others, declaring that thoſe Inſtances conſiſted in their knowledge, and ſome of thoſe Inſtances are fully repeated, by *Ducheſne pag.* 661. who is to be believed, ſince he is a Stranger: And even *Matthew Paris*, a Learned *Engliſh* Hiſtorian, does declare, That king *Richard* the firſt did, when he was going to the Holy War, diſclaim this pretended Superiority over *Scotland*, *anno* 1188. Which Diſclamation is likewiſe obſerved by *Hovedean*, another Hiſtorian of the ſame Nation: And when *Matthew Paris* ſpeaks of the Homage done to the king of *England*, he makes it only to be for his Lands in *England*, *Rex* Scotorum *Willielmus*, *fecit Homagium Regi* Anglorum *Ricardo de jure ſuo in Anglia.* Which is ordinarly the ſtile uſed by Hiſtorians, when they writ of this Subject: And thus *Ducheſne* ſayes, that *Alexander* made Homage to *Henry* the third, for his poſſeſſions in *England*, but refuſed to make him Homage for *Scotland*; and that king *Alexander* ſent a Cartell to king *Henry*, for aſſerting that he had made him Homage for *Scotland.* The Copy of the Homage is yet extant at *Rome*, and the minute of it is thus expreſt, in the Records of our old Abbacies, *Memorandum*, *anno Gratiæ mileſimo ducenteſimo ſeptuageſimo octavo, Apoſtolorum Simonis & Judæ apud Weſtmonaſterium*, *Alexander Rex* Scotiæ, *fecit Homagium domino* Edwardo *Regi* Angliæ, *filio Regis Henrici ſub his verbis*, *Ego devenero hominem veſtrum pro Terris*, *quas de vobis teneo in Regno* Angliæ, *de quibus Homagium vobis debeo, ſalvo regno meo*; *tunc dixit Epiſcopus Norvicenſis, & ſalvum ſit Regi* Angliæ, *ſi jus habuerit ad homagium veſtrum de regno*; *cui Rex ſtatim reſpondit, aperte dicens, ad homagium regni mei* Scotiæ *nullus jus habet*, *niſi ſolus* DEUS, *nec de ullo teneo niſi ſolo* DEO. 4. King *Alexander* having dyed without Males, *Edward* the firſt, treated for a Marriage, betwix *Margaret*, Princeſs of *Scotland*, called the Maid of *Norway*, and *Edward* his ſon: In which there are many pregnant Acknowledgements of this Freedom, *Volentes & concedentes*, *quod deficientibus prædictis Edwardo & Margarita*, *vel eorum altero*, *abſque Liberis extantibus*, *in omni caſu & eventu*, *in quo ad proximiores hæredes Regnum prædictum debeat de jure reverti*, *integre habere*, *abſolute abſque ulla ſubjectione*, *revertatur & reſtituatur iiſdem.* And in the cloſe of that paper it is ſaid, That there ſhall be no prejudice done to either of the kingdoms, *Quin libere habeant ſtatum ſuum*: And in the Deputation given by the Governours of *Scotland*, dated at *Melroſs*, *anno* 1289. for treating that Marriage, this expreſs Reſervation is inſert, *Salvis tamen in omnibus & ſingulis*, *& per omnia*, *Libertate & Honore Regni Scotiæ*: Which Reſervation is likewiſe inſert, in a Warrand granted by king *Edward*, for treating the ſaid Marriage. And it is obſervable, That in all the *Scottiſh* Addreſſes to him, and accepted by him, he is only deſigned *Rex Angliæ*, *Dominus Hiberniæ*, *& Dux Aquitaniæ*, but never deſignes himſelf, *Dominus ſuperior Scotiæ*, till after the War; which ſhews, that his ſeemer airie Title was very unjuſt.

9. As the kings of *England* have acknowledged the *Scots* to be no Vaſſals, ſo have their Laws and Lawyers. For it is contended by theſe, That

the *Scots* were Aliens to *England*, and could not have ſucceeded to any Eſtate in *England*, without being Naturalized; whereas *alibi genitura*, preſuppoſes, that the *alibi nati*, are not Vaſſals: For this *jus alibi genituræ*, called by the *French*, *droit d' aubeyne*, is ſettled upon this Maxime of the Feudal Law, *That becauſe Feus are granted by Over-lords or Superiours, upon deſigne and promiſes, that their Vaſſals ſhal ſerve them upon all occaſions, againſt all perſons, and never reveal their ſecrets, nor conceal what may be their diſadvantage*; therefore Feudaliſts do juſtly conclude, That no man can be Leidge man to two ſupreme Superiours or Over-lords, becauſe theſe Duties are impreſtable to both; ſeing the ſecrets of the one, may be incompatible with the Safety of the other, and they may, by warring againſt one another, diſtract the Alleadgeance of their Vaſſal. And becauſe men are more prone to ſerve their Native Prince, then others, therefore Strangers are alwayes ſuſpect, nor have they allowance to ſell the Feus, to which they ſucceed, leſt they ſhould carry away the price out of the Country, and poſſibly imploy it againſt the ſame Country. Which principle ſeems at firſt to have flowed from the *Roman* Law, by which, the Goods of Strangers dying in *Rome*, fell to the Exchequer or Fisk, *& fiebant caduca.* With this foundation of the Feudal Law, founded upon ſo clear Reaſon, do the Cuſtoms of other Nations agree; who account not theſe Aliens, who live under the ſame Alleadgeance: Thus *Rageau pag.* 67. ~~*Aubatns ſont*~~ Aubains ſont *eſtrangers*, *mais* ~~*enpais*~~ en pais, *qui n' eſt pa de la ſoveraignete de la Courounne de France. Vid. Bacquet. du droit d' aubeyne*, printed in the year, 1557. And by the Cuſtom of *Milain*, (the Experteſt Feudaliſts of all the World) *alibi genitura* extends not to any, who have ſworn Alleadgeance, and live within the *Spainiſh* Dominions, though not within *Milain*: ſince then the *Engliſh* would not allow us the Right of Suceſſion, nor the other benefits due naturally to Subjects, it was ſtrangely monſtruous and repugnant, that they deſigned to make the World believe that we were Subjects.

It is alſo very remarkable, that if our Kingdom had been only a Feu holding of *England*, our Nobility could not have precedency from others, according to their Antiquity; for all the Nobility of the Superiour Kingdom ought, in the opinion of ſuch as writ of precedency, to be preferred to theſe, who live in the Vaſſal-kingdom.

10. If *Scotland* had been a Feu to *England*, the King of *England* as Superiour, would have had the keeping of our young Princes, and the diſpoſing of them in Marriage, and the Feu would have been in his hand, during their Minority, that being implyed in the Right of proper Feus, by the Feudal Law: And this muſt be preſumed to have been a proper Feu, as all Feus are preſumed to be, except the Vaſſal can prove, that the Nature of the Feu was impropriated for the Vaſſals Advantage. But yet no king of *England* did ever pretend, to the *Guardianſhip* of our young Princes, nor to name Governours during their Minority: But on the contrare, *Alexander* king of *Scotland*, having left only a young Princeſs, called *Margaret*, who was Nice to the king of *England*, he did not pretend to the keeping of the young Princeſs, but intreated that ſhe might be married, to *Edward* the ſecond his ſon; and that if there ſhould be no iſſue of that Marriage, *Scotland* ſhould remain a free Kingdom, as it was formerly, in~~the~~ dependent from all pretentions of the kings of *England*: Which is likewiſe another acknowledgement, made by the kings of *England* themſelves, of the

the independency of *Scotland*. And if the kings of *England* had been Superiours of *Scotland*, there would have been ſome Veſtige of this Superiority, to be ſeen in our Laws; whereas all our Laws call ſtill our Crown, the Imperial Crown of *Scotland*: Or in our Coyne, all Coyns bearing ſome Impreſſions from the Superiour. And the Kings of *England* might have remanded from our Courts, or out of our Country, ſuch as had committed crimes againſt their kings, or Laws: It being an undoubted principle of the Feudal Law, That *qui habet dominium directum, poteſt juriſdictionem ſuam explicare, tam in territorio Vaſſalli, quam in ſuo: habet enim dominus juriſdictionem cumulativam cum Vaſſallo.* But ſo it is, that it can never be alleadged, That the Kings of *England* offered to exerce any Juriſdiction in *Scotland*, or did require any criminals, who had fled into *Scotland*, to be delivered up to them: Nor did ever the *Engliſh* pretend to puniſh ſuch *Scotſmen*, as were taken fighting againſt them abroad, as Traitors, and Guilty of Treaſon; as certainly they would have done, if they had been Vaſſals to *England*: But on the contrair, the *Engliſh* did alſo ranſome them, and uſe them every way, as they did other Strangers and Forreigners.

11. The *Scots* having intended a Declarator of Freedome againſt *Edward* the firſt, king of *England*, the Proceſs was delegated by Pope *Boniface* the VIII. to *Baldredus*, one of the greateſt Lawyers of that time, who conſidered very fully, the Reaſons proponed *hinc inde*, by both parties, and having made a full Report to the Pope, the Pope did very ſharply reprove the king of *England*, and declared, that *Scotland* did not depend upon it, any manner of way; and that the *Engliſh* had attacked *Scotland* moſt unjuſtly, againſt all both Divine and humane Laws; as *Ducheſne* obſerves pag. 66. The Letter it ſelf that was writ to the king of *England*, with all the proceſs (which was called *Proceſſus Baldredi*) being yet extant, in *Fordons* Chronicle: And it cannot be denyed, but that *England* might have expected much more favour, from the Pope, than *Scotland* could; ſince they payed him a conſtant Revenue, called *Peters pence*; and ſince *England* was known to afford much greater Caſualties to the Pope, then could have been expected from this kingdom.

In ſtating the Arguments, which are propoſed by the *Engliſh*, for proving that the kings of *Scotland* were Vaſſals, for their Crown, to *England*; I ſhall begin with theſe, which were inſiſted upon by King *Edward* the 1. in the former proceſs.

The firſt was, That *Brutus*, deſcended from the *Trojans*, did conquer *Britain*, and divided it amongſt his three ſons, to the Eldeſt of whom, called by Hiſtorians *Locrin*, or *Locuus*, as he is termed in that proceſs, he left *Logria*, now called *England*: To the Second, called *Albanactus*, he left *Albanie*, now called *Scotland*: To the Third, called *Camber*, he left *Cambria*, now called *Wales*. But *Humbert* King of the *Huns*, having killed *Albanactus*, *Locrin* the elder, to revenge his brothers Death, did kill *Humbert*, and reunite *Albanie* to *Logria* or *England*.

The ſecond was, That *Donvall* king of the *Britans*, killed *Staterius* king of *Scotland*, who rebelled againſt him, and became Maſter of the whole Iſle; which *Dunvall* having two ſons, *Belinus* and *Brounus*, he left the Superiority of *Scotland* with *England*, to the eldeſt, and the property only of *Scotland* to the ſecond.

The third was, That *Arthur* king of the *Britans*, having overcome *Scotland*, he gave that kingdom to *Angusell*, who acknowledged him as his Superiour, and carried the Sword before him.

The fourth was, That *Aldestan* king of *England*, having conquered *Constantine* king of *Scotland*, did pray to GOD, that by the interceſſion of St. *John de Benlaco*, he might by a miracle, be declared the juſt Superiour of *Scotland*: Whereupon he did ſtrick with his ſword, at a Rock near *Dumbar*, and made a Gape in it a full yard in length.

The fifth was, That *William* king of *Scotland*, did acknowledge himſelf Vaſſal, to *William* the Conquerour; *Alexander* king of *Scots*, acknowledged himſelf Vaſſal to king *Henry*: And that the Nobility of *Scotland* called in the ſaid *Edward*, to arbitrate the Differences betwixt the *Bruce* and *Baliol*.

Peter Heylen, ſpeaking of *Scotland* in his Geographie *pag.* 1289. affirms, That the Kings of *Scotland* were ſtill Vaſſals to the Crown of *England*; which he endeavours to confirm by theſe Arguments, 1. By the Homages, Services, and other Duties, done by the kings of *Scotland*, to thoſe of *England*: *Malcome* the third doing Homage to *William* the Conquerour, as *William* one of his Succeſſors, did to *Henry* the ſecond; and that not only for three Counties in the North of *England*, or the Earldome of *Huntingdoun* (as is by ſome pretended) but for the very Crown it ſelf: *Kenneth* the third being alſo one of thoſe Titulary or Vaſſal Kings, who rowed king *Edgar* over the *Dee*. 2. By the interpoſing of king *Edward* the firſt, and the Submiſſion of the *Scots* to that interpoſing, in determining the Contraverſie of Succeſſion, betwixt *Bruce* and *Baliol*: as in the like caſe, *Philip* the fair adjudged the Title of *Artoys*, which was holden of the Crown of *France*, and then in queſtion betwixt the Lady *Mawd*, and her Nephew *Robert*: Or as king *Edward* the third, in the Right of the ſaid Crown of *France*, determined of the Controverſie, betwixt *John* Earl of *Montford*, and *Charles* of *Bluis*, for the Dukedom of *Bretaigne*. 3. By the Confeſſion, and acknowledgement of Prelats, Peers, and others the Eſtates of *Scotland*, ſubſcribed by all their hands, and ſeals, in the Roll of *Ragman*; wherein they did acknowledge the Superiority of the kings of *England*, not only in regard of ſuch Advantages, as the ſword had given him, but as his original and undoubted Right: Which Roll was treacherouſly delivered into the hands of the *Scots*, by *Roger Mortimer*, Earl of *March*, in the begining of the Reign of king *Edward* the third. 4. By the tacite Confeſſion of the kings themſelves; who in their Coyns, Commiſſions, and publick Inſtruments, aſſume not to themſelves the Title of kings of *Scotland*, but of *Reges Scotorum*, or the kings of the *Scots*, and thereby ~~imitating~~ intimating, that though they are kings of the Nation, yet there is ſome Superiour Lord (king *Paramount* as we may call him) who hath the Royalty of the Land. 5. By the Judgements, Arreſts of the Courts of *England*, not only in the times of king *Edward* the firſt, but in ſometimes ſince: For when *William Wallace*, a Scotſman by birth, and the beſt Souldier of that Country, was taken priſoner, and brought to *London*, he was adjudged to ſuffer Death as a Traitor; which had been illegal and unrighteous judgement, had he been a priſoner of War, and not lookt upon by the Judges as ſubject to the Crown of *England*. The like done in the caſe of *Simeon Frazel*, another of that kingdom, in the ſame kings Reign. In like manner, in the time

of

of king *Edward* the third, it was reſolved in the Court, in the Lord *Beaumonts* caſe, when it was objected, That one of the Witneſſes was a *Scot*, and therefore as an Alien not to give his evidence, that his Teſtimony was to be allowed, becauſe the *Scots*, in the Law of *England*, did not go for Aliens. And when one, indicted for a Rape, in the thirteenth year of Queen *Elizabeths* Reign, deſired a *medietatem linguæ*, becauſe he was a *Scots*-man, and ſo an Alien; it was denyed him by the Court, becauſe the *Scots* were not reputed here as Aliens, but as Subjects rather. So alſo, when *Robert Umframville*, Lord of *Kyme*, was ſummoned to the Parliament of *England*, in the Reign of king *Edward* the third, by the name of *Robert* Earl of *Angus*, which is a Dignity in *Scotland*; and after in a Writ againſt him, was called by his own name of *Umframville*, without any Addition of that Honour, the Writ was adjudged to abate; which I conceive, the Learned Judges had not done, if *Scotland* had not been reputed, to be under the Vaſſalage of the kings of *England*. 6. And laſtly, by a Charter of Lands and Arms, which I have in my Cuſtody, granted by king *Edward* the firſt, in the laſt year of his Reign, to *Peter Dodge* of *Stopworth*, in the Countie of *Cheſter*, one of the Anceſtors of my mother: In which it is expreſt, that the ſaid Lands and Arms were conferred upon him, by that king for his eminent Services *encontre ſon grand enemi & rebel Baliol* king of *Scotland*, and Vaſſal of *England*.

In Anſwer to theſe Objections, founded upon the Reign of *Brutus*; I need ſay no more, ſave that *Cambden*, and the other Learned *Engliſh* Writers, do look upon the ſame, as a meer fiction. And for proving the Crown of *Scotland* to hold of *England*, there muſt be authentick Documents in Writ produced, as has been formerly debated: And this does ſufficiently anſwer all that is ſaid of *Bellinus*, king *Arthur*, *&c.* But to refute theſe Fictions, and to ſhow how much of Cheat is in all theſe Contrivances, I need only cite a paſſage, from the Learned *Aylet Sammes*, in his *Britannia antiqua*, *pag.* 159. whoſe words are,

"That which gave ſome Authotity to this Fiction, was the uſe king *Ed-*
"*ward* the firſt made of it, in vindicating his Title to *Scotland*, againſt the
"pretence of Pope *Boniface*, and the Church of *Rome*, who laid claim to
"that kingdom by ancient Right, as part of St. *Peters* Patrimony, and
"that Churches *Demesne*. It appears, that the Monks and Friers had a
"great hand, in making out this Title by *Brute*, which ſtory was now new
"vampt, and from all parts ſent out of theſe ſhops, where at firſt it had been
"forged and hammered out. And this doth more evidently appear, if we
"conſider many other parts of the ſame Letter, as it is found in the Re-
"cords cited by Mr. *Prin*; but eſpecially that miracle of king *Adelſtane*, who
"(*in perpetuam rei memoriam*) to give an evident ſigne of his Right to *Scot-*
"*land*, with his ſword, ſtruck a blow upon a Rock near *Dumbar*, that he
"Cleft it at leaſt an Elne wide.

As to the Homage made by king *Malcome*, to *William* the Conquerour, it is anſwered, That the matter of Fact is abſolutely denyed: And not only do our Hiſtorians, and the Hiſtorians of Forreigners, mention no ſuch ſubmiſſion, but they do on the contrair, relate, That *William* the Conquerour having come with a Deſigne to conquer *Scotland*, he was forced by *Malcome* king of *Scotland* to a Peace, very Honourable and Advantagious for *Scotland*; one Article whereof was, That *William* the Conquerour

ſhould reſtore ſuch of the *Engliſh* Nobility, as had fled to *Scotland* for ſhelter, to their Eſtates and Honours. And how can it be imagined, that *Scotland* being then very Unite, and living under a moſt warlike Prince, would have ſubmitted to a king, who had too much to do at home; or that king *Malcome* would have ſubmitted to him, whom he forced to reſtore even the *Engliſh*, who had Rebelled againſt him. And as the Conſtitution of Vaſſalage requires Writ, ſo if any ſuch Vaſſalage had been acknowledged, he had accepted of a Charter holding of the Conquerour, as all the other Vaſſals did.

As to King *Williams* Homage to *Henry* the ſecond, it is Anſwered, That *William* having been treacherouſly made Priſoner, he was forced by a long and tedious Impriſonment, to make this Homage; and conſequently, the Homage it ſelf was null, being extorted by Force, and made by a perſon who was not *ſui juris*, being in priſon. It being certain by the Laws of all Nations, *That Deeds done by Priſoners are null*; but eſpecially in this caſe, where the Deed was ſuch, as that it would have been null however. For even the moſt abſolute Kings, are ſo far from being able to alienate their Kingdom, or enſlave it, that by ſo doing, (as ſome ſay) they forfeit their own Right, and make the Throne void for the next Succeſſour, who is not obliged by what they have done. And if any ſuch Act as this were binding, then *England*, by the ſame Argument, had remained a Feu of the Empyre; ſince *Richard* the firſt their King did Homage to *Henry* the Emperour, for *England*; and King *John* his brother, did the like Homage to the Pope, and offered to hold *England*, *in capite*, of *Murmelius* a *Sarazen*. King *Edgar's* being rowed over the *Dee*, by *Kenneth* king of *Scotland*, is taken off by the former Anſwer, though it were true as it is not, nor can it be made appear, by a Chronological Computation, if the Enquiry were worth our pains.

The great Inſtance founded upon the Homage made by the *Baliol*, is as weak; ſince it is known, that King *Robert* the *Bruce* refuſed to do Homage to King *Edward*, chooſing rather to want a Crown, then to be a Vaſſal for it: But *John Baliol* the other Competitor, preferring his Ambition to his Native Country, was therefore juſtly diſowned by the Nobility, who (as *Ducheſne* a Stranger to us obſerves) ſent Ambaſſadours to King *Edward*, to ſhow him that they did Revoke, and Diſown the Homage made by the *Baliol*, and aſſerted their primitive Liberty. And ſo hateful an Act was this eſteemed in him, that he loſed the Crown by it; whereas had this pretence of *England* been founded upon any Juſtice, it could never have been ſo ſeverly either oppoſed or puniſhed. But though *Baliol* had been a lawful King as he was not, (King *Robert* the *Bruce's* Title being preferable in Law;) yet could not the *Baliol* have ſubjected the Kingdom in Vaſſalage to *England*, ſince by the Feudal Law, a Superiour cannot ſuperinduce or interpoſe another Superiour, *nec ſine Vaſſalli conſenſu alienare jus ſuum directum, c.* 1. § *ex eodem deſcendit de Leg. Lotharii.* And though ſome debate, that by ſuch Alienations of the Superiority, the Superiour forfeits his Right, yet all agree that the Alienation is null; *nulla & irrita*, D. D. *in cap. imperialem* § *præterea de prohibit. alien. per Fredric. Curt. p.* 16. *num.* 3. *& latiſſime Roſenth. cap.* 9. *concluſ.* 62.

Whereas it is pretended, That the Parliament of *Scotland* conſented; It is Anſwered, That any Parliamentary Conſent is altogether denyed: For though

though we have exact Records of all our Parliaments, yet there is not ſo much as Mention made amongſt all our Statutes or Books, of any Parliament held by *John Baliol.* And albeit *Prin* has publiſhed all the Records, which the *Engliſh* have upon this Subject, yet he dares not ſo much as aſſert, much leſs produce the Copy of any ſuch Act of Parliament: And certainly if there had been ſuch an Act of Parliament, not only the Records of that Parliament, but that particular Act had been carefully preſerved and publiſhed; and that this Parliament and Statute is a meer Fiction, appears not only by our own, but Forreigne Hiſtorians. And it is not imaginable, that the greater part of the Nobility and Kingdom, having immediatly diſowned the *Baliol*, for acknowledging this Subjection, that they would themſelves have ratified it in a free Parliament. But though this were true as it is not, yet there is not any Kingdom ſo Loyal, Happy, or Invincible, but ſome few Cowards or Rogues may be found in it, who may aſſume the name of a Parliament, and diſown the true Intereſt of the Kingdom, without any Warrand from the People for that effect. And I would very willingly know, if *England* remains ſtill Vaſſal to the Pope, becauſe a Monk prevailed with King *John*, to hold his Crown of him? or if *Portugal* ſhould not be acknowledged a free Crown, becauſe *Spain* did once elicite from them a National Conſent, by Force of Arms? Or if theſe three or four pretended *Engliſh* Parliaments, who acknowledged *Oliver Cromwel* the Uſurper, did ſettle a Legal Right upon him by their Concourſe? Nor did Preſcription Supply here the Original illegality of that Conſent; for the *Scots* did immediatly reclame, and did within much fewer years, than Preſcription requires, reſtore themſelves to their Liberty, under the Conduct of that Glorious Prince, King *Robert* the *Bruce*, for whom GOD did ſo Miraculous things, as did Convince the World, how much the LORD of Hoſts detaſted the Bribry, and Cruelty of King *Edward* the firſt: *Et ita res facile redeunt ad ſuam naturam, & quæ mox rediit divertiſſe non videtur.*

But to ſhow how great Averſion even that Generation had, for any ſuch Submiſſion to the *Engliſh* Monarchy, I have ſet down the Copy of a Letter yet extant, under all the Seals of our Nobility, directed to Pope *John*, in *anno* 1320. Wherein they Declare, that if their King ſhould offer to ſubmit to *England*, they would diſown him, and chuſe another. Not that the power of Electing Kings, was ever thought to Reſide in our Nobility; But becauſe it was repreſented to them, as the Opinion of all Lawyers, that a King could not alienat his Kingdom, or ſubmit himſelf by his ſole Conſent, to a Forreigne Prince: Since by that Alienation and Submiſſion, he does Forfeit his Right to the Crown. As to which Letter likewiſe I think fit to obſerve, to prevent any Miſtake as to the Calculation of the number of our Kings, that the Writers thereof have, as is uſual with us, numbred amongſt our Kings ſuch of the Royal Family, as were for the time Regents or Viceroys. The Letter follows.

Sanctiſſimo Patri in CHRISTO *ac Domino, Domino* Ioanni, *Divina Providentia Sacroſanctæ Romanæ & Univerſalis Eccleſiæ ſummo Pontifici, Filii ſui humiles & devoti,* Duncanus *Comes de Fyfe,* Thomas *Randulphi Comes Moraviæ, Dominus Manniæ, & Vallis Anandiæ,* Patricius *de Dunbar, Comes Marchiæ,* Maliſius *Comes de Strathern,* Malcolmus *Comes de Levenox,* Willielmus *Comes de Roſs,* Magnus *Comes Cathaniæ & Orcadiæ,* & Willielmus *Comes Sutherlandiæ,* Walterus *Seneſcallus Scotiæ,* Willielmus *de Soules Buttelarius Scotiæ,* Iacobus *dominus de Dowglas,* Rogerus *de Moubray,* David *dominus de Brechine,* David *de Grahame,* Ingelramus *de Umfravile,* Ioannes *de Meneteith Cuſtos Comitatus de Meneteith,* Alexander Frazer, Gilbertus *de Haia Conſtabularius Scotiæ,* Robertus *de Keith Mariſcallus Scotiæ,* Henricus *de Sancto-claro,* Ioannes *de Grahame,* David *de Lindeſey,* Willielmus Olifant, Patricius *de Grahame,* Ioannes *de Fenton,* Willielmus *de Aberuethie,* David *de Weyms,* Willielmus *de Monte fixo,* Ferguſius *de Ardroſan,* Euſtachius *de Maxwell,* Willielmus *de Ramſay,* Willielmus *de Monte alto,* Alanus *de Moravia,* Douenaldus Campbell, Ioannes Camburn, Reginaldus *le Chen,* Alexander *de Seton,* Andreas *de Leſcelyne,* & Alexander *de Straton, cæterique Barones & Libere-tenentes, ac tota Communitas Regni* Scotiæ, *omnimodam Reverentiam filialem, cum devotis pedum oſculis beatorum. Scimus, ſanctiſſime Pater & Domine, & ex antiquorum Geſtis & Libris colligimus, quod inter cæteras Nationes egregias, noſtra ſciz.* Scotorum *Natio multis Præconiis fuerit inſignita: Quæ de majori Scythia per mare Tirenum, & Columnas Herculis tranſiens, & in Hiſpania inter ferociſſimos, per multa temporum Curricula, reſidens, a nullis quantumcunque Barbaricis poterat alicubi ſubjugari; Indeque veniens, poſt mille & ducentos annos a tranſitu populi Iſraelitici, ſibi ſedes in Occidente quas nunc obtinet, expulſis Britonibus, & Pictis omnino deletis, licet per Norwegienſes, Danos & Anglos ſæpius impugnata fuerit, multis ſibi Victoriis, & Laboribus quamplurimis adquiſivit; ipſaſque ab omni ſervitute liberas, ut priſcorum teſtantur hiſtoriæ, ſemper tenuit. In quorum Regno, centum & treſdecem Reges de ipſorum Regali Proſapia, nullo alienigena interveniente, regnaverunt. Quorum Nobilitates & merita, licet ex aliis non clarerent, ſatis tamen patenter effulgent, ex eo quod Rex Regum* Dominus IESUS CHRISTUS, *poſt Paſſionem & Reſurrectionem ſuam, ipſos in ultimis Terræ finibus conſtitutos quaſi primos, ad ſuam Fidem ſanctiſſimam, convocavit: Nec eos, per quemlibet in dicta fide, confirmari voluit, ſed per ſuum primum Apoſtolum, quamvis Ordine ſecundum vel tertium, ſanctum* Andream *meritiſſimum beati* Petri *Germanum, quem ſemper ipſis præeſſe voluit ut Patronum. Hæc autem ſanctiſſimi Patres & Prædeceſſores veſtri ſolicita mente penſantes, ipſum Regnum & Populum, ut beati* Petri *Germani peculium, multis favoribus & privilegiis quamplurimis muniverunt. Itaque Gens noſtra, ſub ipſorum protectione, libera hactenus degnit & quieta; donec ille Princeps Magnificus Rex* Anglorum Edwardus, *Pater iſtius qui nunc eſt, Regnum noſtrum Acephalum, Populumque nullius mali aut doli conſcium, nec Bellis aut Inſultibus tunc aſſuetum, ſub amici & confœderati ſpecie, immumerabiliter infeſtavit: Cujus Injurias, Cædes & violentias, Prædationes, Incendia, Prelatorum Incarcerationes, Monaſteriorum Combuſtiones, Religioſorum Spoliationes & Occiſiones, alia quoque*

Enormia

enormia, quæ in dicto populo exercuit, nulli parcens Ætati aut Sexui, Religioni aut Ordini, nullus ſcriberet, nec ad plenum intelligeret, niſi quem Experientia informaret. A quibus malis innumeris, ipſo juvante qui poſt vulnera medetur & ſanat, Liberati ſumus per ſereniſſimum Principem, Regem & Dominum noſtrum, Dominum Robertum, *qui pro Populo & Hæreditate ſuis, de Manibus inimicorum liberandis, quaſi alter* Maccabæus, *aut* Joſue *Labores & Tædia, Inedias & Pericula, Læto ſuſtinuit Animo: Quem etiam Divina Diſpoſitio, & juxta Leges & Conſuetudines noſtras, quas uſque ad mortem ſuſtinere volumus, juris Succeſſio, & debitus noſtrorum Conſenſus & Aſſenſus, noſtrum fecerunt Principem atque Regem. Cui tanquam illi per quem ſalus in Populo facta eſt pro noſtra Libertate tuenda, tam jure quam Meritis tenemur, & volumus in omnibus adhærere. Quem, ſi ab inceptis deſiſtet, Regi* Anglorum *aut* Anglicis *nos, aut Regnum noſtrum volens ſubjicere, tanquam inimicum noſtrum, & ſui noſtrique Juris Subverſorem ſtatim expellere niteremur; & alium Regem noſtrum, qui ad defenſionem noſtram ſufficiet, faciemus: Quia quamdiu Centum vivi remanſerint, nunquam* Anglorum *dominio aliquatenus volumus ſubjugari. Non enim propter Gloriam, Divitias aut Honores pugnamus, ſed propter Libertatem ſolummodo, quam nemo bonus niſi ſimul cum vita amittit. Hinc eſt, Reverende Pater ac Domine, quod Sanctitatem veſtram, cum omni Præcum inſtantia, Genu flexis Cordibus exoramus; Quatenus ſincero corde, menteque pia recenſentes, quod apud eum cujus vices in terris geritis, non ſic pondus, & pondus nec diſtinctio Judei & Græci, Scoti aut Anglici, tribulationes & anguſtias nobis & Eccleſiæ DEI illatas ab Anglicis, paternis occulis intuentes; Regem Anglorum, cui ſufficere debet quod poſſidet, cum olim Anglia ſeptem aut pluribus ſolebat ſufficere Regibus, monere & exhortari dignemini, ut nos Scotos in exili degentes Scotia, ultra quam habitatio non eſt, nihilque niſi noſtrum cupientes in pace dimittet. Cui pro noſtra procuranda quiete quicquid poſſumus, ad ſtatum noſtrum reſpectu habito, hoc facere volumus cum effectu. Veſtra enim intereſt, Sancte Pater, hoc facere, qui Paganorum feritatem, Chriſtianorum culpis exigentibus, in Chriſtianos ſævientem aſpicitis, & Chriſtianorum terminos arctari indies: Quare ne quid veſtræ Sanctitatis memoriæ derogat, & ſi, quod abſit, Eccleſia in aliqua ſui parte veſtris temporibus patiatur Eccliſin aut* Scandalum, *vos videritis. Exhortet igitur Chriſtianos Principes, qui, non cauſam ut cauſam ponentes, ſe fingunt in ſubſidium Terræ ſanctæ, propter guerras quas habent cum proximis ire non poſſe: Cujus impedimenti cauſa eſt, vereor, quod, in minoribus proximis debellandis, utilitas proprior & reſiſtentia debilior æſtimantur. Sic quam læto corde dictus Dominus Rex noſter, & nos, ſi Rex Anglorum nos in pace dimittet, illuc ibimus; qui nihil ignoret ſatis novit: Quod* CHRISTI *Vicario totique Chriſtianitati oſtendimus & teſtamur. Quibus ſi Sanctitas veſtra Anglorum relatibus nimis credula, fidem ſinceram non adhibet, aut ipſis in noſtram confuſionem favere non deſinat; corporum excidia, animarum exitia, & cætera quæ ſequentur incommoda, quæ ipſi in nobis, & nos in ipſis fecerimus, vobis ab altiſſimo credimus imputanda. Ex quo ſumus & erimus in his quæ tenemur, tanquam obedientiæ filii, vobis tanquam ipſius Vicario in omnibus complacere; ipſique tanquam ſummo Regi & Judici, cauſam noſtram tuendam committimus: Cogitatum noſtrum jactantes in ipſo, ſperanteſque finem, quod in nobis virtutem faciet, & ad nihilum rediget hoſtes noſtros. Serenitatem & Sanctitatem veſtram conſervet altiſſimus Eccleſiæ ſuæ ſanctæ per tempora diuturna. Datum apud Monaſterium de* Aberbrothock *in* Scotia, *ſexto die* Aprilis, *Anno Gratiæ mileſimo treſcenteſimo viceſimo, Anno vero Regni Regis noſtri ſupra dicti, quintodecimo.*

This anſwers likewiſe *Ragmans* Roll; nor are we to conſider who conſented to Slavery: Since it is known that not only the *Dowglaſs*, the *Grahame*, and *Wallace*, but Thouſands of others, never yeilded even to that ſhort Impreſſion: And their Country preſerved its Priviledges, by their Loyalty; it being an undoubted Principle in Law, That *in re pari potior eſt conditio prohibentis, & in re communi nemo dominorum juri quicquam facere poteſt invito altero, l. ſubimus ff. ad exhibendum.*

To that Argument by which it is urged, That our Kings did never aſſume the Title of Kings of *Scotland*, but called themſelves only Kings of *Scots*, It is Anſwered, That the Argument is very Ridiculous; for firſt it is founded upon a falſe Suppoſition, it being moſt evident from our Writs in the Reign of King *David* the Maiden, that our King was entituled, *Rex Scotiæ*; but in the Confirmation of the Abbacy of *Aberbrothick*, King *William* is called *Rex Scotiæ*, and his Queen *Regina Scotiæ*. Likeas in that Regiſter, there is a Charter granted by King *John* of *England*, wherein *ad petitionem Willielmi Regis Scotiæ*, he grants a Liberty to the Monks of *Aberbrothick*, to Tranſport their Goods through *England*, free from Cuſtome: And *Matth. Par.* in many Treatiſes related by him gives them that Title: And Pope *Innocent* the third, in an expreſs Reſcript in the body of the Canon Law *cap.* 4. *decret. de immunit. Eccleſ.* writes *Innocentius III. Illuſtri Regi Scotiæ*, which behoved to be to King *William*, who did reign in that Popes time. Nor is this Argument from the Deſignation concluding, ſince it is not convertible; For even Feudatory Kings did, and do aſſume their Deſignation from the Kingdom they hold, as the Kings of *Naples*, *Sicily*, *&c.* Which evinces that it follows not neceſſarly, that the Kings of theſe Kingdoms were Feudatory Kings; becauſe they were deſigned *Reges Scotorum*, and not *Scotiæ*. And in many places of his Hiſtory *Matth. Paris* calls the Kings of *England*, *Reges Anglorum*, as in the whole Lives of King *John*, *Henry* the third.

It appears alſo, by the former Tranſaction betwixt *Edward* the firſt, and the Governours of *Scotland*, that *Margaret* is even by the King of *England*, conſtantly Deſigned *Regina ac Domina Scotiæ*: And I obſerve, that in the Contract of Marriage, betwixt *Henry* the VII. for his Daughter Queen *Margaret*, and *James* the IV. that ſometimes the King of *Scotland* is called *Rex Scotorum*, and ſometimes *Rex Scotiæ*, in the ſame paper; and the Commiſſion granted by the King of *Scotland*, for compleating that Marriage, is called *Commiſſio regis Scotiæ pro matrimonio*; in all which Contract, the King of *Scotland* is called, *Chariſſimus noſter frater*, a Title never granted to a Feudatory King by his Superiour, and the people of *Scotland*, are there called *Subditi Regis Scotiæ*, whereas if the King of *Scotland*, had been only a Feudatory Prince, we had been Subjects to the King of *England*, and not to the King of *Scotland*. And there needs no other Argument againſt *Heylen*, to prove that the Kings of *Scotland*, were oft-times called *reges Scotiæ*, than the inſtance brought by himſelf, of the Charter granted by King *Edward* the firſt to *Peter Dodge*, wherein *Baliol* is confeſſed by himſelf to be called *Roy de Eſcoſſe*, King of *Scotland*: And this proves that the ſaid *Heylen* layes down Grounds, which are not only falſe, but inconſiſtent. But ſecondly, though this were true, yet it proves nothing; ſeing the *Goths* and *Picts* were a free people; and yet their Kings were called *Reges Pictorum & Gothorum*, which Phraſe was ordinary amongſt

amongſt Conquering Nations, ſuch as the *Scots* were, whoſe Princes having at firſt no fixed Kingdom, did, whilſt their people were ſpreading themſelves in Collonies, rather aſſume a Title from the people, than from their Country. And ſeing Men are Vaſſals and not Land, it will follow, according to the terms uſed by Feudaliſts, that ſeing our Kings were *reges Scotorum*, that therefore the men were not Vaſſals; and ſo they hold not their Land of the Crown of *England*, nor were *ejus ſubvaſſalli*, *aut Valvaſſores*.

The Argument urged from many Deciſions in *England*, finding that we were puniſhable as Traitors in *England*, and that we were lookt upon as Subjects and not as Aliens, by their Judges, deſerves no other Anſwer, then that ſince their Kings by their power, could not make us Vaſſals, neither could their Parliaments or Judges treat us as ſuch; And if their Gownmen could have made us ſuch, they needed not have imployed Arms to have ſhed ſo much Blood in the quarrel: Nor can ſuch Domeſtick Teſtimonies prove in a caſe of ſo great importance. And yet even the *Engliſh* Proceedings againſt thoſe of our Nation ſhows, that their own Judicatories and Lawyers, conſider us not as Vaſſals, but as the Subjects of a free and independent Kingdom. And amongſt many other Inſtances, I ſhall only remember that of Queen *Mary*, againſt whom that Nation proceeded not as a Vaſſal, but as a perſon who had made her ſelf lyable to their Juriſdiction, *ratione loci delicti*. Which is very clear by *Zouch. de judicio inter gentes, part.* 2. *ſect.* 6. whoſe very words I have here ſet down, to prove not only this, but that the Kings of *Scotland* were *abſoluti*, and equal to, and independent from thoſe of *England*, being both *pares & abſoluti principes*, His words are, *Erant boni rerum Eſtimatores, qui aſperius cum illa actum affirmabant, eo quod fuerit Princips libera & abſoluta, in quam ſolius Dei ſit Imperium, quod in majeſtatem peccare non poſſet, cui ſubdita non fuerit quod par in parem non habeat poteſtatem, unde judicium Imperatoris in Robertum Siciliæ regem, irritum pronounciatum eſt, quia Imperio ejus non eſſet ſubditus. Alii aliter cenſebant, illam ſcilicet, ſubditam eſſe etſi non originariam, tamen temporariam; Quia duo abſoluti principes quoad authoritatem, in uno Regno eſſe non poſſunt; parem in parem habere poteſtatem, quoties paris judicio ſe ſubmiſerit, vel expreſſe verbis, vel tacite contrahendo, vel delinquendo, intra paris ſcilicet juriſdictionem, & Papam ſententiam Imperatoris in Robertum Siculum reſcidiſſe; quod factum in territorio Imperiali non fuerit, ſed Papali. Denique nullum magnum extare exemplum, quod non aliquid ex iniquo habeat.* And in the Proceſs againſt the Biſhop of *Roſs*, as it is related both by the Forreign Lawyers, and by *Cambden*, it clearly appears that he was proceeded againſt, not as a Subject of *England*, but as a meer ſtranger, who not being ſubject *ratione originis*, became ſubject *ratione delicti*, as they alleadged. And the Learned Author of the late *jus maritimum*, *pag.* 451. having ſpoken of the Juriſdiction of *England* over *Ireland*, has theſe words, " But in *Scotland* it is otherwayes, for that is a Kingdom abſolute, and not " like *Ireland*, which is a Crown annexed by Conqueſt, but the other is " by Union: And though they be United under one Prince *ad fidem*, yet " their Laws are diſtinct, ſo as they had never been United; and therefore " the Execution of the judgements in each other, muſt be done upon Requeſt, " and that according to the Law of Nations. Nor need I anſwer the Argument brought from the procedure, againſt the Heroick *Wallace* and others,

for

for theſe inſtances ſhow rather an exceſſive reſentment upon preſent Hoſtilities, then the Juſtice of thoſe, who againſt the Law of Nations, proceeded to murther ſuch as were indeed priſoners of War, fighting for their own Native King and Country: And even the *Engliſh* of that age, by entring into Truces, Ranſoming of Priſoners, and doing all other things (which are only allowable in a juſt War) may convince all Mankind, that in this and the like Inſtances, they ſuccumb'd to the bitterneſs of their preſent Paſſion.

I muſt here alſo crave Leave to aſſert, That though Vaſſals are not to be treated as Aliens, yet we find very frequently in Hiſtory, that whole Nations have been Naturalized, and have had all the Priviledges of Subjects communicated to them, without being Vaſſals or Subjects: And thus the *Pelopidæ* were naturalized *Perſians*, by *Artaxerxes* King of the *Perſians*, and allowed to enjoy all their Priviledges, in remuneration of the great Services done by them to the *Perſians*, as *Plutarch* obſerves in the Life of *Pelopidas*: And thus the *Athenians* communicated their Priviledges to the *Rhodians*; and the *Latins* to the *Romans*, as *Livius* obſerves *lib.* 25. And it is very clear, that the like was done by the *Engliſh* to us, by a Statute of St. *Edward*, which is yet extant in a Book called χρυσονομια publiſhed by *William Lambert*, *anno* 1568. And Ratified by the Conquerour, amongſt the good Laws of that Prince, as *Hollenſhed* obſerves. Amongſt others who are to be reputed of the ſame Nation with the *Engliſh*, we find the *Scots* mentioned in the Statute; for which two Reaſons are given in it, *quia omnes ferme Scoti proceres ex Anglis conjuges cæperunt, & ipſi rurſus ex Scotis, & ſic facti ſunt duo in carne una*; That is to ſay, Becauſe moſt of all the *Scotiſh* Nobility did take Wives of *Engliſh* Extraction, and the *Engliſh* of *Scotiſh*.

The ſecond Reaſon added in that Statute is, *quia ſimul & in unum contra Danos & Norwegos atrociſſime pugnaverunt*. And it is very well known to ſuch as underſtand Hiſtory, that untill theſe late and unhappy Wars, occaſioned by the Shires of *Northumberland*, *Weſtmorland* and *Cumberland*, the *Scots* aſſiſted the *Engliſh* in all their Wars; eſpecially; as that Statute ſayes, againſt the *Danes* and *Norwegians*, by whom they were called by thoſe Invaders, to ſhare in the Victory; but they refuſed the offer, and fought near two hundred Years againſt theſe Uſurpers: In which Wars, they are ſaid to have loſt two Kings, with an hundred thouſand Men; all which the *Scots* might have preveened, by ſuffering the *Danes* to paſs peaceably to *England*, through their Territories. And it is obſervable in the Hiſtories of both Nations, that the *Danes* were never expulſed from *England*, till they were firſt beat in *Scotland*; till at laſt they were forced to ſwear, that they ſhould never return into this Iſle; and in Return of which Aſſiſtance, we got from *England* this Priviledge in the ſame manner, that *Lewis* the XII. communicated to us a general Naturalization in *France*, with all the Priviledges competent to the Natives of that Kingdom, when we were forced to aſſociat with it, to ſecure our ſelves againſt the invaſions of our old friends.

CHAP.

CHAP. IV.

The Debates betwixt the Kings of Pole, Sweden, Denmark, *&c. and other Princes.*

THe King of *Sweden* pretends to Precedencie from the other two; and *Nolden* in his *Treatise of Nobilitie, chap.* 9. *num.* 107. leaves the Precedencie betwixt *Sweden* and *Denmark* to be dubious: And though some prefer the *Dane* as a Member of the Empyre, grafted therein in *anno* 1542. Yet others think him, upon that account, the less preferable, because he is thereby in a manner no free and Soveraign Prince; *Peter King* of *Denmark* having really become Vassal to *Fredericus* 1. Emperour, *Otto. Fris. lib.* 2. *cap.* 21. But *Pontanus* relates that the Emperour did upon this account give him the right hand, and thereby preferred him to *Sweden.* I find also in the Council of *Basil*, that *Ravallus* Arch-bishop of *Upsale*, did claim Precedencie to his Master the King of *Sweden* from all the Christian Princes, he being the true Successour of the *Gothish* Kings, who exacted Tribute even from the Emperours and Kings of *France.* Both *Denmark* and *Sweden*, claim the Precedencie from the King of *Pole*, as an Elective and Limited Monarch: And in the Ceremonial of *Rome*, *Pole* is placed after the other two: And it is undenyable, that *Sigismund* King of *Swed*, being chosen King of *Pole*, he did in all his papers prefer always the Title of *Sweden* to that of *Pole.*

The King of *Pole* has debated for Precedency with the King of *Portugal*, in *anno* 1557. But at *Rome*, Pope *Julius* the second, preferred *Portugal*: And yet the Debate was renewed under *Charles* the fifth, In whose Reign, both their Ambassadours meeting in his Court at Church; and the Ambassadour of *Portugal* having possest the first place, the other made a sign, as if he would have spoken in private with him, at which the *Portugal* rose, whereupon the *Polonian* run in to his seat, *Hottoman de Legat. lib.* 3. *cap.* 21.

The King of *Hungarie* contests for Precedency with the King of *Pole*: But in the interview betwixt *Maximilian* the Emperour, *Sigismund* King of *Pole*, *Uladislaus* King of *Hungarie*, and *Lodowick* King of *Bohemia*, in *anno* 1515. the King of *Pole* was preferred to walk on the Emperours right hand. But this Controversie being renewed at the Council of *Trent*, They, as all other Kings were ordained to take place, not according to their Dignities, but according to the date of the Production of their Commissions in the Council.

The King of *Hungarie* argues for the Precedency from the King of *Bohemia*: Because, amongst the Emperours Titles, *Hungarie* is set down before *Bohemia*; But *Bohemia* oppons the Golden-bull of *Charles* the fourth Emperour, Wherein it is ordained, that in all Acts which concern the Empire, *Bohemia* shall preceed all other Kings: So that it seems that the

King of *Hungarie* ought to preceed in all things not relating to the Empire; But that *Bohemia* is to preceed in all that relates thereto.

There are other Soveraigns who are not Crowned-heads, Such as *Savoy*, *Mantua*, *Florence*, *Ferara*, *Parma*, *Venice*, who Debate also their respective Precedencies in this manner.

The Duke of *Savoy* is by *Pius* the fifth, Declared to be the first Prince of *Italy*, And in the Chappels of *France*, *Venice*, *&c.* gets the first Seat, And as King of *Cyprus* pretends to be ranked amongst the Crowned-heads: But it may be admir'd why the Duke of *Savoy* takes the Title of Royal Highness; For, if he be King of *Cyprus*, he ought to have the Title of Majesty; and if he be not King, Royal Highness is not due to him. And the Duke of *Mantua* did contend with him, though his Competition was not sustained, *vid. Crus. pag.* 511. And though the Title of Eminencie was bestowed upon the Dutchess of *Mantua*, by *Ferdinand* the second; Yet that was a Complement bestowed by the Emperour, rather with respect to her Sex, and her Relation to the Imperial Family, then to the true Dignity due to her as Dutchess of *Mantua*, *vid. Limneum*, *Jur. pub. lib.* 5. *cap.* 14.

The Duke of *Florence* was still preferred to the Duke of *Ferara*, by *Charles* the fifth, And *Port. lib.* 4. *Resp.* Juris. 167. confesses, That *Florence* was acknowledged to be first, by the Emperour, by *Rome*, and by *France*: But yet *Paul* the third considering that the Dutchie of *Florence* was onely erected in *anno* 1531. Whereas the Family of *Est*, were raised to be Dukes by *Paul* the third, 1452. and were declared Dukes of *Ferara* by the Emperour, 1454. did therefore prefer *Ferara* to *Florence*.

CHAP. V.

The Precedencies amongst Common-Wealths.

IT cannot be denyed, but that Kings and Crowned-heads have the Precedency from Common-wealths; though they contend that they being the Freest of all men, are the Noblest; And being in Effect a Countrey of Kings, ought to be preferred to any one King: Especially, since their Government is elder then that of Kings, men having drawn themselves into Societies, before they either submitted to Kings who assum'd that Government by Force, or Elected Kings, because they could not agree amongst themselves.

There are some Common-wealths who claim precedency, as having right to Kingdoms: And thus *Venice* claim'd the same precedency with Crown'd-heads in the Popedom of *Urban* the eight, and *Innocent* the fifth, because they had right to the Kingdom of *Corsica*; But this was denyed.

Genoa contended with *Venice* for precedency at the Coronation of the King of *Cyprus*, 1373. but that King preferred *Venice*: And to extinguish these Differences amongst the Common-wealths of *Italy*, *Venice* is by opinion of all Lawyers, preferred to all the Common-wealths of *Italy*, *Calefat. de Legatis. dignit. n.* 124. *Crus. de preced. pag.* 536.

Genoa

Genoa and *Sienna* did alſo contend, *anno* 1530. at the Coronation of *Charles* the fifth; but the Debate was not then decided: And yet *Cruſ. pag.* 545. prefers *Genoa*.

The *States General* contend with *Venice*, and all other Common-wealths, as being the more powerful, and being a Society of Common-wealths. They pretend alſo to Precedency from all the Princes of the Empire, as being more Independent then they, and being equal to Kings; Whereas theſe Princes are but Subjects, which is delicately Debated by *Beſold. de Preced. cap.* 2. But yet the preſent Emperour has preferred the Electors to all Ambaſſadours of Common-wealths, by an expreſs Ordinance related in *Cruſ. p.* 545. And now *Holland*, as having a kindneſs for the Empire, Treats the Ambaſſadours of the Electors, as thoſe ſent by Crowned-heads: And in return of that Kindneſs, the Electors Treat ſuch as are ſent from *Holland*, with the ſame Reſpect, *Memor. Ambaſſad. pag.* 523.

Of old the Duke of *Savoy* did preceed the Common-wealth of *Venice*: But *Emanuel Philbert* Duke of *Savoy*, during the Oppreſſion he lay under from *Charles* the fifth, put himſelf under the protection of *Venice*, and became a Son of St. *Mark*; And thereafter, as the Father behov'd to preceed the Son, the Dukes of *Savoy* yeelded to *Venice*: And as that Duke pretends Right to the Crown of *Cyprus*, by the Marriage of *Anne* of *Cyprus*, and the Donation of *Charlot* of *Cyprus*: So *Venice* pretends Right to the ſame Crown by the Donation of *Catharine Cornara*, Widow to *James* King of *Cyprus*. The Difference is now thus ſettled, That *Venice* ſhall Treat the Ambaſſadours of *Savoy*, as they do theſe of Kings, with the title of Excellency, And *Savoy* ſhall allow *Venice* the Precedency, *Memor. Ambaſſad. pag.* 347.

Mazarin treated the Ambaſſadours of the Common-wealth of *England*, as thoſe ſent from Kings, *Mem. Ambaſſad. pag.* 334.

The *Cantons* of *Swiſſe* were even of late a part of the Empire: But by the Treaty betwixt the Empire and the King of *Swed*, 1648. they are declared Free States, *Et in poſſeſſione ſeu quaſi poſſeſſione libertatis, & exemptionis ab Imperio.* And now their Ambaſſadours or Envoys take place after the *Venetian*, and *States General*. And albeit *Nolden de Stat. Nobil.* Thinks that if they were called to ſit with the States of the Empire upon any extraordinar Occaſion, they were not to be preferred to the Princes of the Empire, and much leſs to the Electors: For *licet jura Principum habent paſſive & materialiter, Principes tamen non ſunt formaliter & active.* Yet other Lawyers prefer them to all the other States and Princes of the Empire, except the Electors, *Cruſ. pag.* 556. The *French* King treats them with the title of *Magnifiques Seigneurs*: And though their Deputies could not prevail with the *French* King, in *anno* 1602. and 1603. to be covered when he received them; Yet I conceive, that now they will be received as the Ambaſſadours of *Holland* or *Venice*, who are covered at their Reception, ſince in *anno* 1646. they are acknowledged to be a Free State.

The *Griſon* Ambaſſadours were received in *anno* 1627. as the Miniſters ſent by the Princes of the Empire, and with the ſame Honours.

CHAP. VI.

Of the Precedency of the Electors and the Princes of the Empire.

AMongſt the Princes of the Empire, the Electors are ſtill preferred: Which Electoral Colledge (though ſaid to be Founded by the Emperour *Otho* the third; and Pope *Gregory* the fifth, *anno* 997) yet it is more probable, that the ſaid Conſtitution aroſe from the great Difficulties under which the Empyre was Sunk, after the Death of *Frederick* the ſecond.

Amongſt the Electors, the *Eccleſiaſticks* are preferred to the *Laicks*.

The Eccleſiaſtick Electors, are, the Arch-biſhops of *Mentz*, *Cullen*, and *Treves*, whoſe Precedency amongſt themſelves was firſt Determined by *Charles* the fourth: So as that the Biſhop of *Treves* was to ſit juſt over againſt the Emperour; The Biſhop of *Mentz*, was to take place in all his own Dyocie, and in all *Germany*: Whereas the Arch-biſhop of *Cullen*, was to take place in all his own Dyocie, and in *Italy*, and *France*. And of old in the Election of the Emperour, the Biſhop of *Mentz* was preferred as Arch-chancellor of *Germany*: The Arch-biſhop of *Treves* as Arch-Chancellour of *France*: And the Arch-biſhop of *Cullen* as Arch-chancellour of *Italy*; Which Order was confirmed by *Frederick* the 1. *anno* 1158.

The Secular Electors are Ranked thus, by the *Golden-bull* of *Charles* the fourth.

The Duke of *Saxony* carries the Sword, immediately in all Proceſſions before the Emperour: The *Count-Palatin* the Imperial Aple, walking on the Emperours Right hand: The Marqueſs of *Brandenburg* the Scepter, on the Left hand; And the King of *Bohemia* was to follow him immediately. But when they ſit at any Solemnity, by the ſame Bull, The King of *Bohemia* (being a Crowned-head) was to ſit firſt, upon the Emperours Right hand, after the King of the *Romans*, and the Arch-biſhops of *Mentz*, and *Cullen*: And upon the Left, after the Eccleſiaſtick Electors, the Duke of *Saxony* had the firſt place, and the Marqueſs of *Brandenburg* the ſecond. But yet I find *Bentherus*, and other *German* Lawyers, contend from old Manuſcripts, That at firſt *Brandenburg* had the Precedency from the Electors, *Palatin*, and *Saxony*.

The Duke of *Bavaria* did of old Contend with the Duke of *Saxony*, in *anno* 1511. and their Debates continued by proteſtations for many years; And with the Elector *Palatin*, till the Emperour *Lewis* the fourth Ordained the *Palatin* and *Bavaria* to precede one another alternately: Though ſince the late Warres of *Germany*, the Elector *Palatin* having Uſurped the Crown of *Bohemia*, the Duke of *Bavaria* was made the firſt Elector in his place, the Elector *Palatin* being now the laſt of the Electors.

It is alſo obſervable, That if any of the Electors themſelves be preſent, they

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are preferred to the Ambaſſadours, and Repreſentatives of all the abſent Electors; as was Decided in *anno* 1654. Excepting onely the Ambaſſadours of *Auſtria*, and the Ambaſſadours of Forreign Kings, were ſtill allowed to take place from all the Electors, except the King of *Bohemia*, in all the Solemnities of the Empire. But the Ambaſſadours of Commonwealths having claimed the ſame precedency, The Emperour *Leopold* has Decerned againſt them, in favours of the Electors, *Cruſ. lib.* 4. *cap.* 4.

The eldeſt Sons of the Electors preceed all the other Princes of the Empire.

The Arch-dukes of *Auſtria* have the firſt Seat next to the Electors.

CHAP. VII.

Of the Precedency of Church-men.

I Need not debate the Differencies that have fallen in amongſt the Patriarchs of *Rome*, *Conſtantinople*, *Antioch*, *Alexandria*, and *Jeruſalem*: Thoſe of *Rome* and *Conſtantinople* having claimed Precedency, becauſe their See were the ſeats of the *Roman* aud *Grecian* Empires; Thoſe of *Jeruſalem* claiming preference, becauſe the chief Prieſt-hood was once ſettled there; Thoſe of *Antioch* claiming precedency, becauſe *Antioch* was the firſt ſeat of Chriſtianity, as is clear by the 11. chapter of the *Acts*; And thoſe of *Alexandria*, pretending that they were equal to the *Roman* Patriarch, at leaſt, becauſe *Alexandria* was the chief City of the *Eaſt* before the building of *Conſtantinople*, and the Church thereof being by *Euſeb. lib.* 11. ſaid to be κορυφην απασῶν εκκλησιων. *vide*, *Salmaſ. de Primat. pap. cap.* 12. Thus far did Precedency invade even Religion, and raiſe Emulation amongſt thoſe who pretended to be the greateſt Paterns of Humility.

The *Roman* Patriarch was by *Phocas* the Emperour raiſed above all the reſt, in the year 606. ſince which time they have raiſed themſelves by ſeveral Degrees to the *Papacy*, though it cannot be denyed but even before that time, the Biſhops of *Rome* had the firſt Seat in all Councils, as is clear by *Juſtinians Novella.* 131. *cap.* 2. And in the Council of *Nice*, *Adrian* Biſhop of *Rome* had πρωτοκαθεδρια: But the πρωτεια Or the power of preceeding did ſtill belong to the Emperours, as hath been fully cleared by *Cruſius* and others: And though it be pretended, that *Conſtantine* the Great did from Chriſtian Humility, prefer the Succeſſour of St. *Peter* as *Vicar* of *JESUS CHRIST* to himſelf; and that in the Canon Law, *cap. Conſtantinus* 14. *Diſt.* 96. the Emperour *Conſtantin* is brought in acknowledging himſelf to have led the *Popes* Bridle, and in the Famous Ceremonial of *Rome*: *Fol.* 21. the Emperour is allowed no higher place then the *Popes* Foot-ſtool; Yet *Frederick* the 1. Emperour did contentiouſly Debate this Precedency with *Adrian* the fourth, ſince which time it hath been variouſly acquieſced in by *Popes* and Emperours. And though the Legats be Repreſentatives of the *Popes*, yet *Thuan* tells

us, *lib.* 98. That the Learned *Brissonius* President of the Parliament of *Paris*, would not suffer the Popes Legat to preceed him. And at the Coronation of *Charles* the fifth, the Pops Legat was denyed the precedency from the Electors.

The Cardinals have Debated for Precedency with the Patriarchs, though by the *Novella*, 132. *c.* 2. *Justinian* places Patriarchs next to the Pope: And *Panormit. in cap. antiqua* X *de privileg. & excess. Prælat.* prefers the Patriarchs to the Cardinals; and now by the Concession of *Sextus Quintus*, that Pope, hath raised the Cardinals to an equal Degree with Kings, and if Kings be present at Table, or other Solemnities with Cardinals, If there be but one King, he is to sit after the first Cardinal Bishop, and if there be moe Kings, they sit mixtly with the Cardinals, first a Cardinal and then a King: But though this holds amongst Popish Princes, yet the Authour of *Les Memoirs des Ambassadeurs* does Observe, That *Leicester*, *Grotius*, and the other Ambassadours of PROTESTANT Princes never yeelded Precedency to Cardinals, till *Lockhart* Ambassadour for *Cromwel* yeelded it to Cardinal *Mazarine*; Where he likewise observes, That though the Prince of *Condie*, yeelded the Precedency to Cardinal *Rechlieu*, yet the Count of *Soisson* refused it.

The Bishops of *Scotland* preceed in this manner.

Arch-bishops of { St. *Andrews*, 1
Glasgow. 2

Bishops of {
Edinburgh, 1
Galloway, 2
Dunkel, 1
Aberdeen, 2
Murray, 3
Rosse, 4
Brechin, 5
Dumblane, 1
Caithness, 2
the *Isles*, 3
Argyl, 4
Orknay. 5

I find by Letter in *anno* 1625. that before King *James* going into *England*, the Marquesses of *Scotland* did take place from the Arch-bishops; But now the Arch-bishops take place from all Dukes and Marquesses, in imitation of *England*: And by a Letter in *anno* 1626. renewed in *anno* 1664. The Arch-bishop of St. *Andrews* is to take place from all Subjects, which is to be limited, as not to exclude the Kings Children, and Brothers as I conceive; And *de facto* the Arch-bishops of St. *Andrews* ceds to the Chancellour, since the Letter.

The

The Biſhops of *England* Preceed thus,

Arch-biſhops of { *Canterbury*, *York*.

Biſhops of { *London*, *Durham*, *Winchester*, St. *Davids*, *Ely*, *Norwich*, *Hereford*, *Salisbury*, *Peterborough*, *Carliſle*, *Worceſter*, *Rocheſter*, *Landaff*, *Lincoln*, *Bangor*, *Exeter*, *Chicheſter*, St. *Aſaph*, *Oxford*, *Lichfield* and *Coventrie*, *Briſtol*, *Gloceſter*, *Cheſter*, *Bath* and *Wells*.

CHAP. VIII.

General Obſervations concerning the Precedency *of Subjects.*

NObility is devided with Us, as in *England* in *Nobiles Majores & Minores*, the Greater and the Leſſer Nobility: Under the Greater are comprehended all ſuch as are Lords of Parliament: Under the Leſſer are comprehended Knights and Gentlemen. And though all theſe be not Peers of Parliament, yet they are all Peers to one another; And thus a Gentleman may be offered to a Dukes Daughter, whoſe Ward and Marriage falls to the King, as has been often decyded, nor can that Match be refuſed upon the account of Inequality: And it hath been found, that though Noblemen muſt be jndged by their Peers, yet Landed Gentlemen may paſs upon their Aſſyſe; and a Nobleman is oblieged to accept of a Challenge from a Gentleman as his Peer, where Duels are Lawful. Under the word Barron all Our Nobility are comprehended, as is clear by the 81. *Act. Parl.* 14. *Ja.* 2d. And the Inſcription of the firſt Parliament of K. *Ja.* 5th. where the Parliament is ſaid to be holden *per Regis & Regni tutorem una cum Prælatis Barronibus & Burgorum Commiſſariis.* Albeit the Parliament of *Rob.* 1. was *cum Epiſcopis, Abbatibus, Prioribus, Comitibus, Barronibus, & aliis Magnatibus*, which ſhews, that there were other *Magnates infra Barrones.* It may be Doubted, Whether the Younger Sons of Dukes, Marqueſſes, *&c.* are to be Ranked *inter Nobiles majores*, ſince they ſit not in Parliament; Or

inter Nobiles Minores, ſince they are deſigned Lords, and take place from many of the *Nobiles Majores.*

The Sons of the Kings of *France* were all Kings, and Soveraigns in the firſt two Races, Becauſe, according to the old *German* Cuſtom, the Few and Honours were devided equally amongſt the Sons: As now all the Sons of a Duke are Dukes there, *&c.* But thereafter all the other Children, except the Eldeſt, got onely place and Precedency according to their Offices or Dignities, until *Philip de Valois* Succeeded as Prince of the Blood in a remot Degree; After which, the *French* thought fit to give Precedency to thoſe, who might one day be their King: And ſo all the Princes of the Blood got precedency from all Subjects.

With Us the Kings Children, Uncles, and Nephews, onely had precedency from all Subjects; And in SCOTLAND no remoter Degree preceed as Princes of the Blood, For the Families of *Hamiltoun*, *Kinghorne*, *Fintrie*, and others are Deſcended from Our Kings by lawful Marriages, but had no precedency upon that account.

The firſt place next to the King is due to the Prince of SCOTLAND amongſt Us, who is likewiſe Duke of *Rotheſay*; as the ſecond Son is Earle of *Roſs*, that being an Appanage inſeparable from him by Act of Parliament: But at preſent his Royal Highneſs is with Us Duke of *Albany*, as he is Duke of *York* in *England.*

It has been doubted, Whether the Kings Son, Uncle, Nephew, *&c.* have the Precedency from the Kings Officers in the actual exerciſe of their Office, as at Coronations, Riding of Parliaments, in which it is the *Conſtables* priviledge to ride upon the Kings Right hand, and the *Mariſhals* on his Left, in his return from the Parliament houſe: The Reaſon of which Difficulty is, becauſe theſe are Acts which follow the office and not Blood, and the Nature of the Action requires that they ſhould be poſted, where they may be moſt ſerviceable. I find likewiſe, that this hath been Debated in *France*, whereupon in *anno* 1576. *Henry* the third emitted an Ordinance in Favours of the Princes of the Blood; And with Us, his Royal Highneſs the Duke of *York* at His *Majeſties* Coronation preceeded all the Officers.

Amongſt the Princes of the Blood, the Laſt deſcended from the Royal Family has ſtill Precedency accordingly; But though this hold in the Branches, yet the Eldeſt of the ſame Branch will preceed all of that Branch, and thus the Prince *Palatins* Grand-Child would ſucceed to the Crown before Prince *Rupert* his Brother, though Prince *Rupert* be ſeveral Degrees nearer.

I find that of old all Church-men were Ranked together, and were firſt Ranked before all Laicks: And thus the Parliament of King *Robert* the firſt, was *habito Solemni tractatu cum Epiſcopis*, *Abbatibus*, *Prioribus*, *Comitibus*; and even before the Kings Sons, Brothers, or Nephews. Thus King *Robert* the firſt grants a Charter to the *Abbacy* of *Aberbrothick*, Confirming a Ratification made to them be *Lundie*, wherein the Witneſſes are, *Reverendis* Waltero & Gilberto *Epiſcopis*, *&c.* Davide *Duce de Rotheſay*, *Comite de* Carrick, *Cariſſimo noſtro Filio primigenito*, Roberto *Duce de* Albania *Comite* Fyffe & *Fratre noſtro*: And even the Abbots and Priors were Ranked before them, and when any of them were Officers of State, they were named according to their Eccleſiaſtick preferments: Thus *Jacobo Sancti* Andreæ *Epiſcopo*, Galvino *Archiepiſcopo* Glaſcuenſi *Cancellario noſtro.* And in the Seſſion when it conſiſted of half Church-men, half Laicks,

Laicks, the Church-men ſat on the Chancellors Right hand, and Voted firſt: But it does not follow from theſe Inſtances, that therefore of old any Church-man did take place from the Kings Son, no more then that a Biſhop took then place of an Earl, becauſe he was named before them.

The Archbiſhop of St. *Andrews* was by a ſpecial Letter in *anno* 1626. and Renewed in *January*, 1664. Declared to have the Precedency from the Chancellor, and all His *Majeſties* Subjects: In time of Popery, he was *Legatus natus*, and both then and now he is *totius Scotiæ Primas*; But though by this Letter he is Ordained to take the place of all Subjects, yet I think it would not give him place from the Kings Sons, Uncles, and Nephews, though they be likewiſe Subjects; ſince the word Subjects muſt be here Interpret according to the Cuſtom of Nations, by which theſe near Relations of Princes are preferred to all other Subjects. The Nobility of *Scotland* were either Declared ſuch by Feudal Erections, their Lands being Erected by the King in a Dutchy, Earldom, *&c.* which did of it ſelf make him a Duke or Earl, in whoſe Favours the Lands were ſo Erected; Or elſe they got Patents of Honour, Declaring them Dukes, Earles, *&c.* and this is a much later way, none being Nobilitated by Patents amongſt Us before King *James* the firſt.

The third way of Nobilitating with Us, is by Creation and Solemn Inveſtiture, the whole Form whereof will in all its Ceremonies be beſt known by the following Narration.

The Form of the Creation of the Marqueſs of Hamilton, *and* Marqueſs of Huntly, *tueſday the* 17 *of* April, 1599.

IN His *Majeſties* great Chamber in the Abbay of *Holy-rood-houſe*, where the like Ceremony was wont to be done, being richly hung with Tapiſtry, five Stages or Degrees of Timber were Erected; One for His *Majeſty* on the *Weſt*-ſide, whereon His *Majeſties* Chair of State was ſet under the pale of Honour; One for the Duke; One for the Earles; One for the Lords; and one for the Knights: There was alſo before the Throne a Table covered with cloath of Gold, whereon was laid the Sword, Scepter, and Crown, the Noblemen attending the Ceremony in their reſpective Seats in their Robes, and His *Majeſtie* in His Rob-Royal, being placed in His Chair, The Queen ſitting by; The Lyon King of Arms, and Maſter of Ceremonies, With the Heraulds and Purſivants in their Coats, and Trumpets ſounding, brought in before His *Majeſty* theſe two Noblemen, *viz.* The Earles of *Arran* and *Huntly*, the firſt conveyed be the Duke of *Lennox*, and Earl of *Mar*, the ſecond be the Chancellor, and Earl of *Caithnes*. Thereafter the *Lyon* asked His *Majeſty*, If His *Majeſty* would be pleaſed to promote theſe Noblemen to further Honours: His *Majeſty* anſwered, Yes. Then the *Lyon*, Maſter of Ceremonies, with Heraulds, Purſivants, and Trumpets, Conveyed them into the Green Council-chamber, where they were Deveſted of their Comital Robes, and Veſted in the habit of a Marqueſs, And ſo were again conveyed to His *Majeſties* preſence thus,

The Ordinary Macers that attend the Chancellor and Seſſion making place:

Maſter of *Ceremonies.*

Trumpets ſounding with the Noblemens Colours at their Trumpets,

Purſivants in their Coats;

Heraulds in their Coats;

Four Gentlemen for each of the Perſons to be Created, bearing their Honours, *viz.* For my Lord *Arran*, *Robert Hamilton* of *Goſlington*, the Penon; *Alexander Hamilton* of *Fenton*, the Banner; *Claud Hamilton* of *Shawfield*, the Marqueſs Crown; *John Campbel* of *Ardkinlas*, the Patent. For my Lord *Huntly*, *John Ogilvy* of the *Craig*, the Penon; *John Crichton* of *Frendraught*, the Banner; *Mark Ker* of *Ormiſtoun*, the Crown; *Alexander Gordon* of *Strathd-n*, the Patent.

Lyon King of Arms.

The two Earles conveyed be the forenamed Noblemen in their reſpective Robes, and Crowns on their Heads:

Coming before the King they made their Reverence; Then they were led up by the Maſter of Ceremonies ſome ſteps, and ſitting down on their Knees on Velvet Cuſhions, the *Lyon* made an Harrangue, both to His *Majeſty* and to them, Declaring to the Noblemen, That it pleaſed His *Majeſty* to promote them to that Dignity, and that he deſired them to Fear GOD, and obey His Power: Then he took their Oaths, that they ſhould obey GOD, his *Majeſty*, and mantain the Religion then profeſt. Thereafter the *Lyon* delivered to His *Majeſty* the Patents, and His *Majeſty* redelivered them to the *Lyon*, who gave them to the Noblemen, In token that they ſhould obey GOD and His *Majeſties* Laws: Afterwards, the *Lyon* delivered His *Majeſty* the Marqueſſes Coronets, His *Majeſty* redelivered them to the *Lyon*, The *Lyon* put the Crowns on their Heads, ſaying, *John* Marqueſs of *Hamilton*, Earl of *Arran*, Lord *Even*, &c. *George* Marqueſs of *Huntly*, Earl of *Enzie*, Lord *Gordon*, and *Badzenoch*, &c. The ſame was Proclaimed furth of the windows by the *Heraulds* and *Purſivants*, with ſound of Trumpet: Then were they conveyed to their Seats, and placed above the Earles, upon the Kings left Hand, Trumpets ſounding.

The *Lyon* deſired His *Majeſty* to Honour the Gentlemen, who bare the Honours, with the Honour of Knight-hood, His *Majeſty* conſented: The *Lyon* cauſed them ſit down on their Knees at the foot of all the Stage, and after he had made an Exhortation to them, and received all their Oaths, they holding up their Hands, and promiſing to obey all the Injunctions, The *Lyon* preſented the Sword to His *Majeſty*, who ſtroke each of them therewith on the Right ſhoulder, and Sir offered the Spur, the *Lyon* firſt proclaiming their Styls, and after the *Heraulds* and *Purſivants* at the windows with ſound of Trumpet.

I find this Difference in the Creation of many Earles from what is here ſet down, That the four Gentlemen bear the Honours thus, The firſt, the Penon; the ſecond, the Standart; the third, Sword and Belt; the fourth, the Crown; and laſtly, the *Lyon* bear the Patent in a Velvet bag: And that the *Lyon* offered firſt to His *Majeſty* the Sword and Belt, and receiving it back, put it on the Perſon Nobilitat.

As alſo when the King was not preſent, and after His going to *England*, The Ceremony was performed be His *Majeſties* High Commiſſioner, if there

was

was one at the time; Or otherwiſe, a Writ was direct to the Lord Chancellor appointing him Commiſſioner for that Creation; And then the firſt thing that was done after the perſon to be Created was brought in, the *Lyon* gave the Patent to the Commiſſioner, who gave it to the Regiſter, or Clerk of Council to be read. And I Obſerve this in all Our old Creations, that if the perſon to be Dignified was a Lord formerly, he was conveyed in be two Lords, and the Ceremony of the new Creation being over, was conveyed to his place by two of that degree to which he was advanced.

The *Engliſh* Nobility are ſometimes Created by being called in a Write to Parliament, under the Deſignations of Earles, Viſcounts, *&c.* Which way is unknown to Us in *Scotland*, though the King may introduce it at His pleaſure.

The Precedency amongſt Subjects is thus Eſtabliſhed in both Kingdoms.

Dukes of the Blood Royal,
Other Dukes according to their Creation,
The Eldeſt Sons of Dukes of the Blood Royal,
Marqueſſes according to their Creation,
Dukes Eldeſt Sons,
Earles according to their Creation,
Marqueſſes Eldeſt Sons,
Dukes Younger Sons,
Viſcounts according to their Creation,
Earles Eldeſt Sons,
Marqueſſes Younger Sons,
Barrons whom We call Lords,
Viſcounts Eldeſt Sons,
Earles Younger Sons,
Barrons Eldeſt Sons,
Barronets,
Viſcounts Younger Sons.

But the Officers in England *are by Act of Parliament*, Henry *the* 8. *thus Ranked:*

Lord Chancellour,
Lord Theſaurer,
The Lord Preſident of the Privy Council,
The Lord Privy Seal.

Theſe four being of the Degree of a Barron, or above, ſhall ſit in Parliament and all Aſſemblies of Council, above Dukes not being of the Blood Royal.

The Lord Great Chamberlain,
The Lord High Conſtable of *England*,
The Earl Mariſhal of *England*,
The Lord Admiral of *England*,
The Lord Great Maſter or Steward of the Houſe,
The Lord Chamberlain of the Houſhold.

Theſe laſt Six, and the Kings principle Secretary, take place according to their preſent State; So that if they be Barrons, they take place above all Barrons; If Earles, above all Earles; If Dukes, above all Dukes.

By a Decree and Eſtabliſhment under the Great Seal of *England* 1°. *Jacobi*, the following perſons are thus Ranked,

Knights of the Garter,
Knights of the Privy Council,
The Maſter of the Wards and Liveries,
The Lord Chancellor, and Under-Theſaurer of the Exchequer,
The Chancellor of the Dutchy,
The Chief Juſtice of the Kings Bench,
The Maſter of the Rolls,
The Chief Juſtice of the common Pleas,
The Chief Barron of the Exchequer,
The other Judges and Barrons of the degree of the Coif,
The Younger Sons of Viſcounts,
The Younger Sons of Barrons,
The Barronets.

The Precedency amongſt Our Nobiliny differs nothing from what is here ſet down, *England* and We agreeing in all points ſince the Union of the two Kingdoms; And eſpecially ſince the Coronation of King *Charles* the firſt, at which time, he Declared he would have it ſo: But to prevent Differences betwixt the Nobility of both Kingdoms, It was Ordered, That all thoſe of the ſame Degree in *England*, ſhould in *England* take place from all thoſe of the ſame Degree in *Scotland*; And all thoſe of the ſame Degree in *Scotland*, ſhould in *Scotland* take place of the *Engliſh*: That is to ſay, All the *Engliſh* Dukes ſhould take place in *England* of all the *Scots* Dukes; And all the *Scottiſh* Dukes in *Scotland*, ſhould take place of all the *Engliſh* Dukes, which was very Juſt and Suetable to the Laws of Nations.

But as to the Ranking of Our Officers, We Differ much from *England*: For clearing whereof, it is fit to know, That with Us there were Officers of the Crown, and Officers of State: The Officers of the Crown were all Deſigned of *Scotland*, as *Conſtabularius Scotiæ*, *&c.* In King *Malcom* the II. his Parliament; The Offices then Extant were, The Chancellour, the Juſtice General, the Chamberlain, the Steward, the Conſtable, and Mariſhal; and they are thus Ranked and have their Reſpective Fees. But by the *Act* 31. *Parl.* 11. *Ja.* 6. The Offices of the Crown are Declared to be, The Theſaurer, Secretar, the Collector, (which Office is now joyned with the Theſaurers) the Juſtice General, Juſtice Clerk, Advocat, Maſter of Requeſts, Clerk of Regiſter: And though theſe be called Officers of the Crown there, I conceive they Differ not from the Officers of State; And theſe words Officers of the Crown, and Officers of State are now Equipollent Terms, ſo far that all the Officers of State are Officers of the Crown by this Act: But the High Chamberlain, Conſtable, Admiral, and Mariſhal, are Officers of the Crown, but are not Officers of State; The ſpeciality of Officers of State being, That in all Acts or Meetings which concern the State, they ſit as Members by Vertue of their office, as in Parliaments, Conventions, *&c.* where the Chamberlain and Admiral come not as ſuch, nor the Conſtable and Mariſhal if they were not Earles.

The Officers of State have oft contended for Precedency amongſt themſelves: And therefore King *James* did in Privy Council, upon the 17. of *June*,

June, 1617. Declare, That in that and all other Parliaments, none ſhould ſit as Officers of State, ſave eight, and though there ſhould be moe of the ſaids Officers by Deputation, Diviſion, or otherwiſe; Yet eight onely ſhould ſit, which eight he did thus Rank by Act of Council; Theſaurer, Privy-Seal, Secretary, Regiſter, Advocat, Juſtice Clerk, Theſaurer-deput, Mr. of Requeſts: And yet His *Majeſty* having appointed Sir *Archibald Atchiſon* to be ſecond Secretary, and he having contended that his place was to be next the principal Secretary; This was Oppoſed by the Regiſter and Advocat, founding themſelves upon the ſaid Act of Council: It was anſwered thereto, That His *Majeſty* might, notwithſtanding of the ſaid Act, have as many Secretaries as he pleaſed, and by that His *Majeſty* was only Limited to eight Officers of State in Parliament; But that not withſtanding thereof, he might make uſe of any eight he pleaſed; and accordingly he had made uſe of the Chancellor, Collector, and Comptroller, as Officers of State in ſeveral Parliaments, notwithſtanding that they are none of the eight Officers mentioned in this Act; Likeas K. *Ja.* had appointed the Lord Chancellor, being a Nobleman, to ſit amongſt the Noblemen, and not as Chancellor, or an Officer of State: The Council did remit this Debate to the King.

I find that upon the 20. of *February*, 1623. the whole matter of Precedency amongſt His *Majeſties* Officers and Counſellors is thus Stated:

The Lord Chancellor,
The Lord Theſaurer,
The Arch-biſhop of St. *Andrews*,
The Arch-biſhop of *Glaſgow*,
The Earles and Viſcounts according to their Ranks,
Biſhops according to their Ranks,
Lord Privy Seal,
Lord Secretary,
Lord Regiſter,
Lord Advocat,
Lord Juſtice Clerk,
Lord Theſaurer-deput,
The Lords of the Seſſion according to their Admiſſion,
Barrons and Gentlemen, being Counſellors, according to their Admiſſion.

It is obſervable from this Act, that Lords of the Seſſion have Precedency from Privy Councellors in *Scotland*, otherwiſe any Counſellor of an elder Admiſſion would be preferred to them; And yet in *England*, Privy Councellors are preferred to all the Judges, and even to the chief Juſtices: And with Us I find no Privy Councellor take place as ſuch, from any perſon whatſoever, which ſeems very ſtrange; For ſince the Judicatur it ſelf is placed before the Seſſion, and that its Preſident hath Precedency from the Preſident of the Seſſion, that therefore its Judges ought to preceed the Judges of the Seſſion. 2do. Though the Lords of Seſſion are Lords of Council and Seſſion, yet there being Secret Councellors, gives them a greater nearneſs, and Argues a greater Truſt: And in all matters of Precedency, theſe are the Chief Topicks for Precedency. 3o. In Law Counſellours are called by the Emperour, *Pars Corporis noſtri l. quiſquis C. ad L. Jul. Majeſt.* And ſo to aſſault them was Treaſon, and is with Us. 4o. In *France* this Queſtion betwixt the Mem-

bers *Magni Concilii*, and the *Senators* of the Parliament of *Paris*, is Debated by *Boerius*, and he prefers the Counſellours; And in *Sweden* they have place from all the Nobility. 5°. The Lords of *Privy* Council have more ſupereminent power, then the Lords of *Seſſion*: For they can ſtop the Precedor of the Juſtices, they can Adjourn the Seſſion, they can grant Precognitions, moderat puniſhments, *&c.* Notwithſtanding of all which, ſuch Reſpect has Our Kings to the Lords of Seſſion, who Diſtribute Juſtice Equally to the People, that they ſtill preferred them to all the Subjects, except the Lords of *Parliament*, and their eldeſt Sons.

It has been contended by the Younger Sons of Noblemen, That they ought to have Precedency from the Lords of *Seſſion*; Becauſe, ſayes the ſecond Son of an Earl, I have Precedency from the Eldeſt Son of a Lord, and yet he has place from the Lords of Seſſion, and it is a certain Rule in Precedency, That if I preceed you, I muſt preceed him who preceeds you: And if an Earles ſecond Son, and a Lords eldeſt Son, and a Lord of Seſſion did meet together, the Earles ſecond Son could not preceed the Lords eldeſt Son, except he preceeded alſo the Lord of Seſſion. To which nothing can be anſwered, ſave that the eldeſt Sons of Peers, being preſumptive Peers, and ſuch as will be Peers, It is fit that the Lords of Seſſion, who have but a Temporary Precedency, ſhould not preceed them.

But I find that though in *England*, the younger Sons of the preceeding Rank, take ſtill the place from the eldeſt Son of the next mediat, as the younger ſons of Dukes, from the eldeſt ſons of Earles, and the younger Sons of Marqueſſes from the elder Sons of Viſcounts: And that all the Chain of Precedency is founded upon this Gradation, and that it ſeems that Nature has led men to this Eſtabliſhment; Yet the eldeſt Sons of Our Lords (Lord Barons) refuſe to Cede to the ſecond ſons of Earls, and it was ſo of old with Us, and that which may be given as a Reaſon for this, is, that it is unreaſonable, That they who are to be Peers, and to have a conſtant Title, ſhould Cede to ſuch as have but a Temporary Honour; But if this Reaſon were ſufficient, the younger Sons of Dukes ſhould not preceed the eldeſt Sons of Lord Barons.

With Us the eldeſt Sons of Lord Barons are Deſign'd Maſters, as the Maſter of *Roſſe*, &c. And of old the Uncles of Lords, after the Death of their elder Brother, though he left a Son, were called Maſters, till the Nephew had a Son: For which I know no other Reaſon but that, becauſe they wanted a Tittle, they took this: For their Father being Lord, there was no Degree below to take, as the elder Sons of Earles took that of Lord. And I believe, that thus the word Maſter was given in *England* to meaner People, when their name was not known: For though the word *Dominus* was refuſed by *Auguſtus*, as importing Slavery, which the *Romans* could not bear, rather then from a ſecret Impulſe, as St. *Auguſtin* ſayes, In reſpect Our *SAVIOUR* was then Born, who was the True Maſter, ſince *Sueton* tells, That *Tiberius* alſo refuſed this Title; yet in Complement even then ſuch as were not known, were called *Domini*: *Obvios* (ſayes *Seneca*) *ſi nomen non ſuccurrit*, *Dominos ſalutamus*, and thereafter with the *Roman* Slavery this Title grew from being a Complement, to be a Duty: And thus the *Grecian* Emperour was called κυριος, and the eldeſt ſon δεσποτης: and from this Title of Maſter, came Meſhip amongſt Us, which was given to all ſuch as had not a ſpecial Title, as Lord, Sir, *&c.*

By

By Act of Parliament likewayes, 14. *May* 1661. The Lord Preſident of the Seſſion is Declared to have Precedency from the Regiſter, Advocat, and Theſaurer-deput; And the Regiſter and Advocat, are Ordained by the ſame Act to have Precedency from the Theſaurer-deput: But the Theſaurer-deput pretending that he is in effect Theſaurer in the Theſaurers abſence, and not the Theſaurer-deput, and that the foreſaid Act of Parliament was in abſence, he now pretends Precedency from both the Regiſter and Advocat.

To the end the ſeveral Offices may be the better underſtood, It is fit to know that the Chancellor is in effect the firſt Officer in the Nation, and is by his Office, and by a particular Statute, Preſident in all Courts, Act 1. Parliament 1. *Charles* the ſecond, which Act of Parliament was made to declare that he was Preſedent of the Exchequer, as well as of other Courts, this having been pretended to by the Theſaurer: He hath his title not from the power of Cancelling, as the old Gloſs ſayes, That *Cancellarius eſt qui habet Officium ſcripta reſponſaque Principis inſpicere, & male ſcripta Cancellare*; For it is not imaginable that he would take his title from what he deſtroys, and not from what he does: But from the *Cancelli* and Barres, within which the Judges did ſit incloſed, ἀπο των κιγκλιδων as is clear by *Caſſiodor lib.* 11. *Epiſt.* 1. Thoſe *Cancellarii* of old were in effect the Clerks, and the Chancellour is ſo called now, Becauſe, he ſigns all the publick Papers, and Appends the Seal, *Ideo quod ad eum univerſæ publicæ referrentur conſcriptiones, ipſeque eas annulo Regis ſive Sigillo firmaret, Simaq; lib.* 1. calls him *Queſtor Legum, Conditor Regalis, Conſilii, Particeps, Juſtitiæ Arbiter*: Which names I conceive are given to him, becauſe *Novel.* 114. *Divinæ juſſiones debent habere ſubſcriptionem glorioſiſſimi Queſtoris*, and many of the *Novels* are ſigned *Queſtor Legum.*

I find that in the Laws of King *Malcolm Keanmore*, the Chancellour is placed before all the Officers, and ſometimes many of the conſiderable Earles are placed betwixt him and the reſt of the Officers: Thus King *Alexander* grantes a Charter, *Teſtibus* Willielmo *de* Boſco *Cancellario meo*, Malcolmo *Comite de* Fyffe, *Alano Seneſcallo* Scotiæ, *&c.*

Some think that there is a Difference betwixt *Cancellario meo*, whom they make Director of the Chancery, and *Cancellario Regni*, whom they make High Chancellour: And others make a Difference betwixt *Cancellarium Regni & Cancellarium Regis*, as *Spotſwood* in his *Hiſtory* obſerves. But I find that the High Chancellour is called *Cancellarius meus*, as in the foreſaid charter, and ſometimes *Cancellarius* ſimply, and ſometimes *Cancellarius Noſter*, and ſometimes *Regni*, and ſometimes *Cancellarius Scotiæ*; And the ſame *Willielmus de Boſco*, is in the *Chartularies* of *Aberbrothick*, and *Calco*, or *Kelſo*, named under all theſe Deſignations.

I find the Director of the Chancery, was onely a ſervant to the Chancellour of old: For in King *Malcolms* time, amongſt the Fees to be payed to the Chancellours Clerks, there is a Fee to be payed to his Clerks for the Breeves, which Breeves belong to the Director of the Chancery; And therefore *Skeen* does juſtly Obſerve, *hinc liquet Officium Directoris Cancellariæ apud majores noſtros ad Cancellarium pertinuiſſe*, and which is very clear by the Statutes of King *Rob.* 3. *cap.* 1. *verſ.* 3.

I find that in theſe Laws, *Juſticiarius*, that is to ſay, The Juſtice General is placed next the Chancellour, but afterward *Scotland* was divided in two

Juſtitiaries, on upon the *South*-ſide of *Forth*, who was called *Juſticiarius Lothaniæ*, and in old Charters *Judex Laudoniæ* : And the other on the *North*-ſide of *Forth*. The Juſtice General is now neither Officer of the Crown,nor Officer of State ; But yet he thinks he ought to have Precedency from the Preſident of the Seſſion, the Juſtice Court being older than the Seſſion ; And being Preſident of a ſupream Court, he is to preceed any Inferiour Member of any other Supream Court : And the King by Declaring that he advanced the Regiſter, when he made him Juſtice General,has clearly ſignified,that the Juſtice General ought to preceed the Regiſter : This place likewiſe has been generally poſſeſſed by Noblemen, and is the ſame with Us,that the Chief Juſtice of the Kings Bench is in *England* : And this Juriſdiction was amongſt others poſſeſſed at *Rome*, by the *Præfectus Prætorio*, who was their chief Magiſtrat.

The Juſtice Clerk by the foreſaid Statutes of King *Malcolm*, appears to have been but his Clerk ; And though by the foreſaid Act of the 11. Parliament K. *Ja.* 6. The Juſtice Clerk be named before the Regiſter and Advocat, yet that is onely *ob continentiam cauſæ*, becauſe they are ſet down, The Juſtice, Juſtice Clerk, and their Deputs. It is Obſervable by that Act, that the Juſtice General is put after the Theſaurer and Secretary, and there the Juſtice Clerk is not made his Officer, as in the Laws of King *Malcolm Keanmore*. I find that *Alanus*, *Juſticiarius Scotiæ*, Deſigns himſelf *Hoſtiarius & Juſticiarius Scotiæ*, which ſhews that *Hoſtiarius* was a preferable Office : and this I take to be Commander of the Kings Hoaſt ; For *Oſtiarius* is not written with an *H*, and is a meaner Office then Juſtice General : This Charter is granted in *anno* 1253. to the Abbacy of *Aberbrothick*, and though others may miſtake the Ranking of a mans Titles,yet the Bearer will carefully Rank his own Deſignations.

The third Officer named in thoſe Laws is the High Chamberlain, *Camerarius Domini Regis :* And I find him in all the old Writes placed as Witneſs, before all the other Officers, next to the Chancellour. There was *Magnus Camerarius*, who was chief Judge over all the Burrowes ; And there were other under Chamberlains, who are oftentimes Deſigned *Camerarii*, without the adjection of *magnus* ; And I find in a Charter granted be K. *David*, in *anno* 1495. the witneſſes are, *Alexandro Domino Huyme, magno Camerario noſtro, Johanne Domino Drumond Juſticiario noſtro, Ricardo Murehead Secretario noſtro, & Waltero Drumond noſtrorum Rotulorum, & Regiſtri, ac a Conſiliis.*

It is Obſervable, that the Officers were oft-times named according to the quality of the Bearers, and not according to the precedency of the Offices : But in the former Charter, *Dominus de Huyme*, and *Dominus de Drumond*, being of the ſame quality, the Chamberlain is put before the Juſtice General. This Office of Chamberlanry was poſſeſſed Heritably of late by the Dukes of *Lennox*, and the Badge was a Golden Key.

This Office is the ſame with *præpoſitus Sacri Cubiculi*, mentioned by *Juſtinian*, and equall'd by him to the *Præfectus Prætorio*, and placed *inter illuſtres Palatinos*, or Counts of the Palace, And is now in *France* called *Grand Chambrier*, and was conſtantly poſſeſſed by the Family of *Burbon*.

I find the *Magnus Camerarius* placed before the Theſaurer in a Confirmation, *anno* 1520. to the Abbacy of *Aberbrothick*.

Seneſcallus Domini Regis, is next in theſe Laws, that is to ſay, The High

High Steward of *Scotland*, and *Allanus Seneſcallus Scotiæ*, is very Famous in all the old Charters, and he is ſtill placed before the Conſtable and Mariſchal: And it appears, that the High Steward, and the Steward of the Kings Houſe were the ſame, for thoſe Laws mention only the Steward of the Kings Houſe; but now the Prince is *Seneſcallus natus Scotiæ*: Under him are there placed the *Panetarius*, who commands over all the Bakers, and *Buttelarius*, who commands over all the Keepers of Taverns, *&c.*

I find the Lord *Souls* was *Buttelarius Scotiæ*, in the Letter before ſet down, Directed from the Nobility of *Scotland* to the Pope, in the Reign of King *Robert* the *Bruce*; And I have ſeen a Charter, wherein *John* and *Thomas Murrayes*, ſons to the Governour of *Scotland* Sir *Andrew Murray*, were deſigned *Panetarii Scotiæ*, upon the Forfeiture of *John Cunning* Earl of *Monteith*, in *anno* 1348. which Earl of *Monteith* was formerly *Panetarius*.

Next to theſe are named in the foreſaid Laws, the Conſtable and Mariſchal: But now the Conſtable and Mariſchal take not place as Officers of the Crown, but according to their creation as Earls; The Reaſon whereof I conceive to be, becauſe of old, Offices did not prefer thoſe who poſſeſſed them, but they took place according to their Creation; whereas now the Privy-Seal precedes all Dukes, and the Secretary takes place before all of his own Rank: But the Conſtable and Mariſchal, being now the onely two Officers of the Crown that are Heretable in *Scotland*, continue to poſſeſs as they did formerly: But in *France*, *England*, and all other places, the Conſtable and Mariſchal take place as Officers of the Crown; and it ſeems very ſtrange, that theſe who Ride upon the Kings right and left Hand, when he returns from His Parliaments, and who guard the Parliament it ſelf, and the Honours, ſhould have no Precedency by their Offices; And yet I cannot deny, but that of old, other Earls were placed before them, for in the former Charter granted by King *Alexander*, *Malcolm* Earl of *Fife* is placed before them.

And I conceive their Precedency has not riſen of late to the ſame proportion with others; Becauſe of late Our Armies have been commanded by other Officers, and ſo there was little uſe for the Conſtable and Mariſchal.

The Conſtable with Us in theſe *Northern-Nations*, is the ſame Office that the *Comes Stabuli* was under the *Roman* Empire, which may be confirmed by two clear Teſtimonies of great Antiquity, one is of *Aimon. lib.* 3. *cap.* 7. *Landgeſilis Regalium præpoſitus equorum, quem vulgo Comes Stabuli vocant*; The other is from *Rheginо*, *lib.* 2. *Annalium Burchardum Comitem Stabuli ſui (quem corrupte Conſtabulum appellabis) cum claſſe miſit in Corſicam*: Though the Learned *Cujac.* does believe that this Title comes from the word κομιταβουλαι, which ſignifies, a company of Men of War, *ad l. unic. de Comit. & Tribun. Scolar.* And there are ſome who derive it from the word *Koning*, which ſignifies a King; and *Staple*, which ſignifies a Hold, becauſe ſome Conſtables were Commanders of the Kings Houſes: But I find that the High Conſtable did command the Kings Armies, but was expreſly debarred from commanding either His Houſes or Garriſons; as *L'oiſeau* well obſerves, *lib.* 4. *cap.* 2. Becauſe, ſays he, It was a great power that one man ſhould command both the Army, and the Garriſons: The Badge of his Office was, and is a naked Sword, which in the *Roman* Empire was the Badge of the Office, *Præfecti Prætorio*; and *Trajan* giving the naked Sword to *Suro Licinius*, who was his *Præfectus Prætorio*, gave it with theſe words,

Pro me ſi mereor in me; Which words were thereafter put by *Buchanan*, with a naked Sword upon the Money, Coined during the Minority of King *James* the ſixth. The Conſtable with Us, was by the Laws of King *Malcolm cap.* 6. Judge to all Crimes committed within twelve Miles to the Kings Houſe or Habitation; Though *Skeen* obſerves, that the beſt Manuſcripts bear only two Leagues: But now his Juriſdiction is only exerciſed either as to Crimes or otherwiſe, during the time of Parliament, which ſome extend likewiſe to all general Conventions.

The *Mariſchal* is a *German* word and Office originally, as the Learned *Tillet* proves fully, *a Marker of Camps*, and the Ax which he bears as the Badge of his Office, was that Inſtrument wherewith he did break the Ground, though now this part of his Office is delegated to the *Mariſchal du Camp*. The Mariſchal commanded the Horſe as *Tillet* proves, whereas the Conſtable commanded both: But yet our Learned *Craig* calls the Conſtable onely *Præfectus Equitum*; And yet as *Tillet* obſerves, the Mariſchal was not under the Conſtable, elſe he could not be an Officer of the Crown: For it is eſſential to all Officers of the Crown, and Officers of State, to depend upon none but the King. Of old I find the Orders in Military caſes run, to Our Conſtable and Mariſchal.

The Office of Mariſchal has never been out of the Family of *Keith*: But the Earls of *Athol* and ſeveral others have been Conſtables of *Scotland*; And therefore it is that the Earl *Mariſchal* hath no other Title; But the High Conſtable deſigns himſelf Earl of *Errol*.

We had no Knight *Mariſchal* in *Scotland* till King *Charles* the Firſts *Coronation*, in *anno* 1633. at which time it was Erected by a Letter to the Privy Council; by his Office he is to take place immediately after the younger Sons of Lords.

The Theſaurer is not mentioned amongſt theſe Officers of the Crown under King *Malcolm Keanmore*, and of old it has been thought but an Office of the Kings Houſe; For in a Confirmation granted to the Abbacy of *Aberbrothick*, in *anno* 1529. by King *James* the fifth, after *Reverendiſſimis Epiſcopis*, and *dilectis conſanguineis*, are enumerate as Witneſſes, *dilectis Familiaribus noſtris* Roberto Barton, *noſtro Theſaurario & Computorum noſtrorum Rotulatore*: Nor do I find a Theſaurer deſigned as Witneſs in any of the Kings Charters till then, though ſome fooliſhly think that *Panetarius* was Theſaurer. And though the word *Familiar Counſellour* be now given to all Officers of State, who are not Earls, becauſe they cannot be called *Couſins*; Yet of old it was only given to thoſe of the Kings own Family, and was derived *à Familia*, though now Familiar is thought to be the ſame with Intimate.

Till of late, Theſaurer, Comptroller, and Collector of the Augmentations were three different Offices, but now they are all joyned in one: Comptroller is in the old Regiſters called *Rotulator*.

The Theſaurer takes now place, as ſecond Officer of State, next to the Chancellor; Next to the Theſaurer is the Preſident of the Privy-Council; After him the Privy-Seal; but the Secetary is only firſt of his own Rank, that is, if a Duke, the firſt Duke, *&c.*

Of old the Secretary was a very Honourable Imployment; For as *Caſſiodor. lib.* 1. *epiſt.* 4. well obſerves, *Honor hic datur egregiis, dum ad Imperiale Secretum, tales conſtat elegi, in quibus reprehenſionis vitium non poteſt inveniri.*

But

But yet I find the Secretary onely named in the former Confirmation, *inter Familiares:* Of old I find he was Stiled, *Clericus Regis*, though ſome Interpret this *Clericus Regis*, to be either Clerk-Regiſter, or the Kings Confeſſor, and Clerk to His Cloſet, and ſome that he was *Almoner.*

We have no Maſter of Requeſts now, that charge being ſwallowed up by the Secretaries Office; Their Office with Us was, as at *Rome*, To repreſent to the King the complaints of the People, *Referendarii* ſays *Caſſiodor. lib. 6. dolores alienos aſſerunt, conquerentium vota ſatiant, & per eos Judices corriguntur.*

I find that *Advocatus Fiſci*, now Our Kings Advocat, or Atturney-General, was dignified with the Title of *Comes*, which is now Earl, *l. jubemus i. de Advoc. diverſ. jud.* and with the Titles of *Clariſſimus & Spectabiles*, which was only beſtowed on the chief Nobility, *l.* 4. & 6. *eod. tit.* and from this ſeems to have flowed Our calling them Lord Advocat; And the *French* calling them *Meſſire*, which Title only the Chancellor and Advocat there get: Upon this Officer, *Rome* in the Reign of *Claudius* the Emperour, beſtowed ſo much Honour, that he ſaid, *Tantum Honoris & Authoritatis conceſſiſſe procuratori* Cæſaris, *ut eum ſuis Legibus adæquaverit, volueritque ut quod ipſe ſtatuiſſet perinde ratum eſſet, ac ſi ab ipſo foret conſtitutum:* And of old they were ſtill of the Order of Knights; for *Tacitus* in the life of *Agricola*, ſays, *utrumque avum procuratorem* Cæſaris *habuit quæ equeſtris Nobilitas eſt.* The Kings Advocat is with Us, as in *France*, *Conſiliarius Natus*, that is to ſay, is by vertue of his Office a Privy Counſellor, in a more peculiar way than the reſt: For I find by the Records of Council in Queen *Maries* time, that the Regiſter and Juſtice-Clerk are expreſly mentioned in the Commiſſion of Council, but the Advocat is in all the Sederunts, though he be not named in the Commiſſion. And though with Us it was not allowed to the Kings Advocat, till Sir *Thomas Hope*'s time, that he ſhould be preſent at the Lords adviſing of Cauſes, where the Advocat was himſelf Intereſted; Yet I conceive, in Cauſes which he pleads meerly upon the Kings Account, he ought to be preſent even when the Cauſe is adviſing: This was allowed *Advocato Fiſci*, for *Trajan* writing to *Plinius*, Commands *eos adhibere in Conſilium à Præſidibus cum de cauſa Fiſcali agitur*, which explains very well, *L.* 7. *de Jur Fiſc.* Where *ſi Fiſcus alicui ſtatus controverſiam faciat, Fiſci Advocatus adeſſe debet, quare ſi ſine Fiſci Advocato pronunciatum ſit divus Marcus reſcripſit, nihil eſſe actum & ideo ex integro cognoſci opportere*: Of which Office the Learned *Budeus* gives this Character, *Magiſtratus is eſt in quem omnes ſuas actiones, Princeps, Populus, univerſi tranſcripſerunt, aſylum Legum, arx Juſtitiæ, innocentiæ vim paſſæ, aut Judicio circumventæ, propugnaculum, interceſſor rerum malarum, ſuaſor rerum bonarum, præſentis ſemper animi, Actor, & Defenſor, de ſententia Juris & Equitatis.*

I find, that though *per* L. *nemo* C. *de aſſeſſor.* no man can be both a Judge and Advocat, yet the Kings Advocats in *France* have been allowed to be Judges at the ſame time they were Advocats; for it was thought that the Office of Kings Advocat, did naturally participate both of the Judge and Advocat, and ſo was not inconſiſtent with the Imployment of a Judge, *Lult. c. de Advocat. Fiſc.* and this was ſo decided by the Parliament of *Paris*, in *June* 1605. And from this We probably in *Scotland* took occaſion, a little after that time, to make Sir *William Oliphant*, and of late Sir *John Nisbet*, both Advocats and Lords of the Seſſion.

The *Almoner* with Us has no Precedency for ought I know, though in *France*, *Le grand Aumoſnier* is thought to be an Officer of the Crown: He is very oft a Witneſs in all Our Charters granted be Our Kings, and ſome think that *Clericus noſter* was *Almoner*.

I find that *Cockburn* of *Lanton*, who was alſo *cuſtos magni Sigilli*, in the ſecond year of King *Robert* the thirds Reign, is made heretable *Oſtiarius noſtri Parliamenti*, that is to ſay, Uſher of the Parliament. The *Lyon* and he does Debate who ſhall go next to the King, or His Commiſſioner, in Parliament and Conventions, The Uſher pretending, that if he behoov'd to go after the *Lyon*, he behooved to go before the Heraulds, and ſo he behooved to walk between the *Lyon* and his Brethren, which were not decent, (though both in *England*, and with Us, I find, that ſeveral Degrees of Perſons do in all Proceſſions, walk between the *Garter* or *Lyon* and his Brethren Heraulds;) Likeas, it is implyed in the nature of the Uſhers office, that he ſhou'd immediately uſher him to whom he is Uſher; but in *England*, I find, that at the Cavalcad, when His *Majeſty* entred *London*, in *anno* 1660. and at His Coronation, *Garter* King of Arms did walk in the midſt, having the Mayor of *London* on his left hand, and the Knight of the Black-Rod on his right: And the Author of *Les Memoirs des Ambaſſadeur* tells Us, that in *anno* 1629. at the Proceſſion, for Celebration of that ſolemn Peace betwixt *France* and *Spain*, the King of Arms did walk immediately before the *French* King, *Le Roy d'armes marchant immediatement devant Le Roy*. I am likewiſe informed, that in *England*, the Precedency runs thus, King of Arms, Uſher of the Black-Rod, Maſter of Ceremonies, and after him the Gentlemen of the Privy-Chamber, *&c.*

The Title of Duke came from *Dux*, a Leader and Commander of an Army, and was at firſt a Title of Office, but now is a Dignity given by Kings and Princes, to men of Blood and good Merit; And with Us, the Prince of *Scotland* (as is already ſaid) is Duke of *Rothesay*.

The word Marqueſs was firſt appropriate to the Lords of the *Marckes* and *Frontiers*, but is ſince become a Title of ſpecial Dignity betwixt a Duke and Earl.

Earl came from the *Saxon* word *Ear-etkel*, which was abridged to *Ear-el*, and afterwards by Abbreviation *Earl*, with the *Dutch* called *Eorle*; and at this day the *Germans* uſe the word *Grave* for it: They are in *Latine* called *Comites* with Us, becauſe in the *Roman* Empire, *Comitatus* was called the Court of the *Prince*, *l.* 43. *de Teſtament. Militar. l.* 13. *ff. de re Militar.* and thoſe who attended the Emperor were called *Comites*, or his Companions: They were appointed to be Governours of the ſeveral Countrys of the Empire, which were from them called *Comitatus* or Counties, and Earls are to this day deſigned Earls of ſuch a Shire; But the Kings thereafter, being deſirous to have their Subjects depending immediately upon themſelves, did appoint Sheriffs in their place to command the Counties, who are therefore ſtill called *Vice-comites*.

Some were likewiſe appointed to command Towns, and ſo theſe *Comites Urbium*, were of a meaner Degree, than the *Comites Provinciarum*; But now Earls who have their Deſignations from Towns, are in the ſame Degree with thoſe who have their Deſignations from Provinces.

Counts *Palatine* were ſuch as had Office in the Kings Palace, and had their name *à Palatio*, as is clear by the whole Titles, *C. de Palatinis ſacrar. Largit.*

Largit. & tit. de Caſtren. Palatinorum peculio: But it is fit to know that theſe Counts *Palatin*, or Officers of the Palace differed in the *Roman* Law from *Domeſtici*, for the *Domeſtici* theſe were properly and onely thoſe who were of the Emperours guards, as is clear, by *l. 3. c. de Protect. & Domeſt.* and *Cujac.* upon that law. The Counts *Palatin* in *England* were ſuch as had Regal power within their own Juriſdictions, nor do I in my reading find any Counts *Palatin* in *Scotland*, ſave *Walterus Palatinus de Stratherne*, who deſigns himſelf *Atholiæ & Cathaniæ Comes*; he gives his lands of *Cortowhy* to the Biſhop of *Brichen*, in *anno* 1429. And I believe the Reaſon why We have ſo few Counts *Palatin* in *Scotland*, is, becauſe Our Lords of Regality have the ſame power; But properly the Officers of the Kings houſe are onely now what the *Comites Palatini* were of old.

For Regulating the Precedency amongſt Earles and Lords with Us, K. *James* the 6. did grant a Commiſſion to ſome Noblemen in *March* 1606. who upon Citation did pronunce the following Decreit, accordi ng to which Decreit theſe Noblemen are at preſent Ranked, and if any of the Noblemen therein prejudged do Reclaim, they uſe to raiſe a Reduction of the ſaid Decreit before the Seſſion, and Adject a Concluſion of Declarator, Craving it may be found and declared that they ought to have Precedency from the Noblemen whom they therein cite:

This Decreet is from its Effect called the Decreet of Ranking, whereof this is the Tenor.

AT *Edinburgh* the 5th. of *March*, 1606. anent Our Soveraign Lords Letters directed, Makand mention; Foraſmuch as His *Majeſty* and the Lords of His Secret Council, Conſidering the great contentions and differencies, quilks many times occurrit and fell out amongſt the Nobility of this Kingdom of *Scotland*, anent the Precedency and Priority in Ranking and Voting in Parliament, and general Councils, and how that this their Contentions lay ever unremembred or agitat, but at the very inſtance of their Meeting at His *Majeſties* Parliaments and Coventions, at whilk time there was greater matter of Impaſhment offered to the Eſtates to compone their Differences, then to intreat upon the principal Subjects, for whilk they were aſſembled: His *Majeſty* and the ſaids Lords, therefore being careful to have this Contention removed, and the contraverſies and eliſts, whilks ariſes amongſt the Nobility for that cauſe ſettled and pacified, wherethrow the Eſtates and Nobility being freed and relieved of ſuch matter of Contention, they may in Peace, Love, and Amity, concur together, and Deliberat upon ſuch matters as ſhall be entreated and motioned in Parliament hereafter: His *Majeſty* for this effect has given his Highnes Commiſſion under the great Seal, to a number of His Nobility, and who are moſt indifferent, and no wayes ſuſpect of partiality, to conveen and call before them, the hail Noblemen of this Kingdom of *Scotland*, and according to their Productions and Verifications to ſet down every mans Rank and Place, as in the Commiſſion foreſaid, paſt under the great Seal at length is contained; and anent the Charge given to *Lodovick* Duke of *Lennox*, *John* Marques of *Hamilton*, *George* Marques of *Huntly*, *Patrick* Earl of *Orkney*, *George* Earl of *Caithnes*, *Alexander* Earl of *Sutherland*, *James* Earl of *Murray*, *Francis* Earl of *Errol*, *George* Earl *Marſhal*,

David Earl of *Crawfurd*, *James* Earl of *Athol*, *John* Earl of *Montroſe*, *James* Earl of *Pearth*, Earl of *Monteith*, *Andrew* Earl of *Rothes*, *Alexander* Earl of *Dumfermling*, *Archibald* Earl of *Argyl*, *James* Earl of *Glencairn*, *John* Earl of *Caſſils*, Earl of *Eglington*, *William* Earl of *Angus*, *William* Earl of *Morton*, *John* Earl of *Marr*, *Alexander* Earl of *Lithgow*, Earl of *Winton*, *Alexander* Earl of *Home*; *Simond* Lord *Fraſer*, *Edward* Lord *Bruce* of *Kinloſſe*, *John* Lord *Forbes*, *Patrick* Lord *Glames*, *James* Lord *Ogilvy*, *Alexander* Lord *Spynie*, *Patrick* Lord *Gray*, *Laurence* Lord *Oliphant*, *John* Lord *Murray* of *Tillibairn*, *David* Lord *Scoon*, *James* Lord *Lindſey*, Lord *Sinclar*, *James* Lord *Balmerinoch*, *Patrick* Lord *Lindors*, *James* Lord *Colvil* of *Culros*, *John* Lord *Fleyming*, *Alexander* Lord *Elphingſton*, *Alexander* Lord *Stuart* of *Ochiltry*, *Thomas* Lord *Boyd*, *Allan* Lord *Cathcart*, *Hugh* Lord *Lowdoun*, *Robert* Lord *Semple*, Lord *Paſley*, *James* Lord *Abercorn*, *John* Lord *Maxwel*, *John* Lord *Harres*, *Robert* Lord *Sanchar*, Lord *Roſs*, *James* Lord *Carlyl*, *Robert* Lord *Roxburgh*, *James* Lord *Hay* of *Yeaſter*, Lord *Newbottle*, *James* Lord *Thirlſtain*, *James* Lord *Torphichen*, *James* Lord *Borthwick*, *Thomas* Lord *Dirlton*, Lord *Seaton*; And the Tutors and Curators of the ſaids Dukes, Marqueſſes, Earles, Lords, if they any have, to have compeard before the ſaids Lords Commiſſioned at an certain day bygaine, and to have brought and produced with them ſuch Writs, Evidents, Documents, and Teſtimonies, as they have or can uſe for acclaiming that Rank and Place of Precedency and Priority challenged be them before others, To have been ſeen and conſidered be the ſaids Lords, Commiſſioners, and they to have heard and ſeen their Ranks and place of Precedency and Priority appointed and ſet down be them, according to their Antiquities of their Productions, and that whilk ſhould be verified in their preſence, and they and every one of them directed to take that place, whilk ſhould be appointed and preſcrived unto them be the ſaids Commiſſioners, as ſaid is, Certifying, all ſuch perſons as ſhould not compear themſelves, or their Procutors in their names, That the ſaids Lords, Commiſſioners, will go on forward in ſetting down every mans Rank, according to that which ſhould be verified as ſaid is, and ſhould proceed according to the ſeveral Inſtructions given be His *Majeſty* to the ſaids Lords Commiſſioners for this purpoſe, and the ſaids Lords Commiſſioners their Determination ſhould ſtand in full force and effect, aye and while an Decreit before the ordinar Judge be recovered and obtained in the contrar; Likeas at more length is contained in the ſaids Lords Executions and Indorſations thereof, which being called, and divers Times and Dyets keeped to that Effect; And the ſaid *John* Earl of *Montroſe*, *Alexander* Earl of *Dumfermling*, *Francis* Earl of *Errol*, *George* Earl *Mariſhal*, and *Alexander* Earl of *Lithgow*, Compearand perſonally, and the ſaid *Alexander* Earl of *Sutherland*, compearand be Mr. *Robert Learmont* his Procutor, and the ſaid Earl of *Marr*, compearand be Mr. *Thomas Hope* his Procutor, the ſaid *David* Earl of *Crawfurd* compearand be *Laurence Scot* his Procutor, the ſaid *Andrew* Earl of *Rothes* compearand be Mr. *David Anton* his Procutor, the ſaid *William* Earl of *Mortoun* compearand be Mr. *Thomas Learmond* his procutor, the ſaid Earl of *Monteith* compearand be *Graham* his Procutor, the ſaid *Heugh* Earl of *Eglington* compearand be *John Bell* his procutor, and the ſaid *John* Earl of *Caſſils* compearand

pearand be *John Hamilton*, and *Gilbert Roſs*, and the ſaid *Andrew* Lord *Stuart* of *Ochiltry*, *James* Lord *Balmerinoch*, *James* Lord *Abercorn* compearand perſonally, the ſaid Lord *Lindſey* of the *Byres* compearand be the ſaid Mr. *Robert Learmont* his procutor, the ſaid *John* Lord *Forbes* compearand be *James Fogo* his procutor, the ſaid *Patrick* Lord *Glames* compearand be Mr. *Patrick Sharp* younger his procutor, the ſaid *Patrick* Lord *Gray* compearand be *Patrick Whyllie* his procutor, the ſaid *John* Lord *Seaton* compearand be Mr. *William Livingſton* his procutor, the ſaid *Allan* Lord *Cathcart* compearand be *George Angus* his procutor, the ſaid *James* Lord *Carlyl* compearand be the ſaid *Robert Hamilton* his procutor, the ſaid *Robert* Lord *Sanchar* compearand be *Creichton* his procutor, the ſaid *James* Lord *Hay* of *Yeſter* compearand be Mr. *James Burchar* his procutor, the ſaid *John* Lord *Harres* compearand be *Corbal Cunningham* his procutor, the ſaid *James* Lord *Torphichen* compearand be Mr. *Robert Learmont* his procutor, the ſaid Lord *Thirlſtain* compearand be *Thomas Fleyming* his procutor, the ſaid *Alexander* Lord *Spynie* compearand be the ſaid Mr. *Robert Learmont* his procutor; And the hail remanent Lords and Earles particularly abovewritten, being oft-times called and not Compearand, divers Terms and Dyets aſſigned to them for this effect, the Writs, Evidents, Documents, and Teſtimonies produced be the ſaids Perſons compearand, and every an of them acclaiming the Priority and Precedency before others, being divers times and at divers Dyets very diligently and exactly Sighted, Tryed, Examined, and Conſidered be the ſaids Lords Commiſſioners, and the ſaids Lords therewith being, as alſo with the Ranks and Places of ſuch Earles and Lords as were Promoted and Created in His *Majeſties* own time, well and throughly Adviſed; The ſaids Lords Commiſſioners has Decerned, Decreited, Appointed, and ſet down, and be theſe preſents Decerns, Decreits, Appoints, and ſets down the Ranks and Places following, to the hail Noblemen of the Kingdom, to be Keeped, Brüiked, and Poſſeſſed by them, in all Parliaments, General Councils, and publick Meetings hereafter.

In the firſt, The ſaids Lords Commiſſioners Diſcerns, and Ordains the Duke of *Lennox* to have the firſt place, the Marques of *Hamilton* the ſecond, the Marques of *Huntly* the third, becauſe be the cuſtom inviolablie obſerved in all Kingdoms the place of Honor amongſt Nobility, is firſt in the perſons of Dukes, and next Marqueſſes, and then in the perſons of Earles, and Lords; and next unto them the ſaids Lords Commiſſioners, Diſcerns, and Ordains the Earles abovewritten, to have Bruiked and Poſſeſſed their Ranks and places, according as they are here written, Ranked, and ſet down, in Order following, *Viz. Angus*, *Argyl*, *Crawfurd*, *Errol*, *Mariſhal*, *Sutherland*, *Mar*, *Rothes*, *Morton*, *Monteith*, *Eglington*, *Montroſe*, *Caſſils*, *Caithnes*, *Glencairn*, *Buchan*, *Murray*, *Orkney*, *Athol*, *Linlithgow*, *Home*, *Pearth*, *Dunfermling*, and *Dumbar*: And ſicklike, the ſaids Lords Commiſſioners Diſcerns, and Ordains, the Lords particularly abovewritten, to have Bruiked and poſſeſſed their Ranks and Places, according as they are here Written, Ranked, and ſet down in Order following, *Viz. Lindſey*, *Forbes*, *Glames*, *Fleyming*, *Salton*, *Gray*, *Ochiltrie*, *Cathcart*, *Carlyl*, *Sanchar*, *Yeſter*, *Semple*, *Sinclar*, *Harres*, *Elphingſton*, *Maxwel*, *Oliphant*, *Lovat*, *Ogilvy*, *Borthwick*, *Roſſe*, *Boyd*, *Torphichen*, *Paſley*, *Newbottle*, *Thirleſtain*, *Spynie*, *Roxburgh*, *Lindors*, *Lowdoun*, *Dirleton*, *Kinloſs*, *Abercorn*, *Balmerinoch*, *Murray* of *Tilibairn*

Tillibairn, *Colvil*, *Culroſſe*, and *Scoon*. And Decerns and Ordains, all Earles, and Lords particularly abovewritten, to Keep, Bruik, and Poſſeſs their Ranks and Places in all times coming, according to the Orders and Ranks abovewritten, now ſet down, Appointed and Preſcrived to them, and to make no Queſtion, Trouble, nor Plea in this Matter, to any appointed to have place and rank in the manner foreſaid. But prejudice alwayes to ſuch Perſon or Perſons, as ſhall find themſelves or their Intereſts prejudged be their preſent Ranking to have recourſe to the ordinar Remeed of Law, be Reduction before the Lords of Council and Seſſion of this preſent Decreit recovered; and of their due Place and Ranks, be Production of more Ancient and Authentick Writs, nor has been uſed in the Contrary of this Proceſs, Summonding all ſuch perſons thereto, as ſhall think themſelves wrongouſly Ranked, and placed before them: And in the mean time this preſent Determination, to ſtand in full Force, Strength, and Effect, ay and while the Party Intereſted and Prejudged obtain Lawfully an Decreit before the ſaids Lords of Council and Seſſion, as ſaid is; And Ordains theſe preſents to be Inſert and Regiſtrat in the Books of Privy Council, and an Authentick Extract thereof to be delivered to the Clerk Regiſter, and another Extract to be delivered to the Lyon-herauld, to be kept be them for the better knowledge and Information of every mans Ranks and Place, when the Occaſion of their Ranking ſhall be Preſented. Extract *de libris Actorum Secreti Conſilii*, *Act.* 8. *D. N. Regis*, *Per me* Jacobum Primroſe *Clericum ejuſdem ſub meo ſigno & ſubſcriptione manualibus.*

It is fit to know, that the Earl of *Dowglas* was by Act of Parliament, Declared to have the firſt Vote in Parliament, and the Carrying of the Crown, and leading of the Vanguard; But K. *James* did in *anno* 1582. prevail with that Earl, to ſuffer the Duke of *Lennox* to carry the Crown for that time, and in *anno* 1632. There is a Charter granted to the ſaid Earl in life-rent, and to his Son in Fee, *cum omnibus privilegiis*, &c. *& ſpecialiter cum privilegio aciem ducendi*, *Coronam gerendi.* &c. But in *anno* 1633. the ſaid Earl being Created a Marqueſs, it is Declared by Act of Council, that he did quite priviledge of having the the firſt Vote in Parliament, upon his Promotion; And yet the Marques of *Dowglas* ſtill pretends, that any ſuch Renunciation could not have prejudged the Family, ſince the Granter of that Renunciation was onely a Life-renter, his ſon having been in Fee.

I find there are ſome titles of Nobility in *England* annexed to places, ſo that who ever is in poſſeſſion of that place, has right to the tittle: Thus it was found in the caſe of the Lord *Abergavenny*, that he in poſſeſſion of the Caſtle, ought to have the title, albeit he be not Heir of Blood. Their Reaſon is, becauſe it is a Barony-marchiere, and it has been found, that Baronies and Caſtles ſituate upon the Borders of *Scotland* and *Wales*, belong alwayes to the Owners; the words of the Tenour being *per ſervitium Patriæ cuſtodiendæ.* It is alleadged, as one of the Reaſons in that caiſe, that the Owners of lands, holding *in capite & per Baroniam*, have Precedency, albeit they be not next Heirs.

The next Degree to the Earles is that of Viſcount, in Latin *Vicecomes*; as being of old Lieutenant to an Earl, *Vicecomites*, *olim dicibantur*, *quibus caſtri Dominus Vices ſuas committebat ſeu executionem Juriſdictionis.* But afterwards Our King gave not the Government of Counties, or Shires, to Earles,

Earles, but appointed Sheriffs who depended upon their own Nomination; and were therefore called *Vicecomites.* In *Bretagn* Barons take place from Viſcounts; But there are no Viſcounts in *Germany*, *Bourgrave* being in their place, *ſpeculat. tit. de Vicecometatu & la Roque de nobilit. C.* 83. We had no Viſcounts in *Scotland* before 1606. for by the aforeſaid Decreet the Lord is declared next to the Earl.

Barons according to *Spelman*, *ſunt Clientes Feodales, & Vaſſalli Capitales, qui Pagos, Urbes, Caſtra, vel eximiam ruris portionem, cum Juriſdictione acceperunt a Rege*; And the word according to him comes from *Vir* or *Vi*, i. e. *robur belli*: But it is more probable that it comes from the Greek word βαρυς, *gravis*, they being choſen wiſe, and Diſcreet men. With Us, all are called Barons who hold their lands of the King *in libera Baronia*, and who have power of pit and gallows; and of old they were all heritable Members of Parliament, as all Barons in *England* are, as is clear by *Act* 52. *Parl.* 3. *Ja.* 1. whereby all Barons are appointed to come to Parliament; and though this Act may ſeem to be abrogated by the 101. *Act*, *Parliament* 7. *James* the firſt, whereby the Barons of each Shire are allowed to chooſe two wiſe men to Repreſent them, which is the cuſtom at this day; Yet it is obſervable, that though by that Act they may for their conveniency chooſe two, yet they are by no expreſs Law diſcharged to come in greater numbers: And by the 78. *Act Par.* 6. *Ja.* 4. no Baron that had below the Rent of 100. Merks, was to be compelled to come to Parliament, unleſs the King particularly wrote for him. And when Taxations were laid on by the Council, I find by the old Records, as particularly in *October* 1562. that Noblemen and Burgeſſes are called, but no Barons: the Barons and Noblemen having been then repreſented promiſcuouſly, and that long after the Act of Parliament, allowing them to ſend Commiſſioners. And this is the Reaſon, why Our old Barons, who are not Lords, and hold onely their lands in free Barony, have *ſupporters* in their Atchievement; and that with ſome reluctancy they yeeld the Precedency to Knights-Baronets, they being Originally heritable Counſellours to the King as Members of Parliament, and not Debarred. The ſeveral Degrees of Nobility before Treated of, did alwayes bear their reſpective Coronets, as in *England*, excepting the Lords, who had no Coronet till the year 1665. There being a Warrand under His *Majeſties* hand, in *June* 1665. Allowing to the Barons or Lords of Parliament in *Scotland*, a certain Crimſon Velvet Cape, with a Golden Circle, decored with ſix Pearles on the Top, equally diſtant one from another, which is the ſame with the Barons Coronet in *England*: But the figure of this Coronet on the margine of the principal Signator, is done far contrare to the words in the Body; The ſame having points like to that of the Earles, which has certainly been a miſtake and ignorance in the Painter, and ought to be adverted to be the Lyon, and Heraulds: This Warrand is Regiſtrat in the books of Council, and in the Lyon Books.

I have here set down for the Readers further Satisfaction, a List of all the Nobility at present in this Nation, their Sir-names and Principal Titles, And Titles of their Eldest Sons; With such Officers as have Precedency be Vertue of their Offices.

The Duke of *Albany*, onely Brother to His most Sacred *Majesty*.

Lord *Chancellour*,
Lord *Thesaurer*,
Lord *President* of the Privy Council,

Lord *Privy-seal*,
Lord *Secretary*, } Above all of his degree.

*** *Nota.* Stuart *Duke of* Lennox, *was the premier Duke, but this Family is lately extinct.*

DUKES.

Hamilton Duke of *Hamilton*,
Scot Duke of *Buccleuch*,
Maitland Duke of *Lauderdale*,
Lenos Duke of *Lennox*.

} *Their Eldest Sons.*

Earl of *Arran*,
Earl of *Dalketith*,
Earl of *Lauderdail*,
Earl of *Darnly*.

MARQUESSES.

all Dukes

Gordon Marquess of *Huntly*,
Dowglas Marquess of *Dowglas*,
Graham Marquess of *Montrose*,
Murray Marquess of *Athol*.

} *Their Eldest Sons.*

Lord *Gordon*,
Lord *Angus*,
Lord *Graham*,
Lord *Murray*.

EARLES.

Dukes

Campbel Earl of *Argyl*,
Lindsay Earl of *Crawfurd*,
Hay Earl of *Errol*,
Keith Earl *Marischal*,
Gordon Earl of *Sutherland*,
Areskin Earl of *Marr*,
Graham Earl of *Airth*, and *Monteith*,
Lesly Earl of *Rothes*,
Dowglas Earl of *Morton*,
Areskin Earl of *Buchan*,
Cuningham Earl of *Glencairn*,
Montgomery Earl of *Eglington*,
Kennedy Earl of *Cassils*,
Stuart Earl of *Murray*,
Maxwel Earl of *Nithisdale*,
Seton Earl of *Winton*,
Livingston Earl of *Linlithgow*,
Home Earl of *Home*,
Drummond Earl of *Pearth*,
Seton Earl of *Dumfermling*,
Fleeming Earl of *Wigton*,
Lyon Earl of *Strathmore*, and *Kingborn*,
Hamilton Earl of *Abercorn*,
Duke Ker Earl of *Roxburgh*,
Areskin Earl of *Kelly*,
Hamilton Earl of *Haddington*,
Stuart Earl of *Galloway*,
Mackenzie Earl of *Seaforth*,
Marquess Ker Earl of *Lothian*,
Hay Earl of *Kinnoul*,
Campbel Larl of *Lowdown*,
Crichton Earl of *Dumfries*,
Duke Dowglas Earl of *Queensberry*,
Alexander Earl of *Striveling*,
Bruce Earl of *Elgin*,
Carnagie Earl of *Southesk*,
Stuart Earl of *Traquair*,
Ker Earl of *Ancram*,
Weems Earl of *Weems*,
Ramsay Earl of *Dalhousie*,
Ogilvy Earl of *Airly*,
Ogilvy Earl of *Findlator*,
Dalziel Earl of *Cranwath*,
Livingston Earl of *Callender*,

} *Their Eldest Sons.*

Lord *Lorn*,
Lord *Lindsay*,
Lord *Hay*,
Lord *Keith*,
Lord *Strathnaver*,
Lord *Areskin*,
Lord *Kilpont* and *Kilbryd*,
Lord *Lesly*,
Lord *Aberdour*,
Lord *Auchterhouse*,
Lord *Kilmawrs*,
Lord *Montgomery*,
Lord *Kennedy*,
Lord *Down*,
Lord *Maxwell*,
Lord *Seton*,
Lord *Livingston*,
Lord *Coldingham*,
Lord *Drummond*,
Lord *Fyvie*,
Lord *Fleeming*,
Lord *Glames*,
Lord *Paslie*,
Lord *Ker*,
Lord *Pettinweem*,
Lord *Binning*,
Lord *Garlies*,
Lord *Mackinzie*,
Lord *Newbottle*,
Lord *Duplin*,
Lord *Mauchlan*,
Lord *Crichton*,
Lord *Drumlanerick*,
Lord *Alexander*,
Lord *Kinlosse*,
Lord *Carnagie*,
Lord *Linton*,
Lord *Nisbets*,
Lord *Elcho*,
Lord *Ramsay*,
Lord *Ogilvy*,
Lord *Deskfoord*,
Lord *Dalziel*,
Lord *Almond*,

EARLES.

Leſly Earl of *Leven*,
Ruthven Earl of *Forth*,
Marquiſs Johnſton Earl of *Anandale*,
Maule Earl of *Panmure*,
Murray Earl of *Dyſert*,
Hay Earl of *Tweeddale*,
Carnagie Earl of *Northesk*,
Bruce Earl of *Kincardin*,
Lindſay Earl of *Balcarras*,
Dowglas Earl of *Eorſar*,
Middleton Earl of *Middeton*,
Scot Earl of *Tarras*,
Gordon Earl of *Aboyn*,
Boyd Earl of *Kilmarnock*,
Cochran Earl of *Dundonald*,
Dowglas Earl of *Dumbritan*,
Keith Earl of *Kintore*,
Sinclar Earl of *Caithnes*.

Their Eldeſt Sons

Lord *Balgonie*,
Lord *Ettrick*,
Lord *Johnſton*,
Lord *Maule*,
Lord *Huntingtour*,
Lord *Yeſter*,
Lord *Roſebill*,
Lord *Bruce*,
Lord *Balneil*,
Lord *Wrudal*,
Lord *Clearmont*,
Lord *Altemoor*,
Lord *Glenlivet*,
Lord *Boyd*,
Lord *Cochran*,
Lord *Dowglas* of *Attrick*,
Lord *Inverury*,
Lord *Berrendalt*.

VISCOUNTS.

Cary Viſcount of *Faulkland*.
Conſtable Viſcount of *Dunbar*,
Murray Viſcount of *Stormont*,
Gordon Viſcount of *Kenmore*,
Arbuthnet Viſcount of *Arbuthnet*,
Crichton Viſcount of *Frendraught*,
Seton Viſcount of *Kingſton*,
Macgil Viſcount of *Oxenford*.
Livingſton Viſcount of *Kilſyth*,
Osburn Viſcount of *Dumblane*.

LORDS.

Forbes Lord *Forbes*.
Fraſer Lord *Salton*,
Gray Lord *Gray*,
Cathcart Lord *Cathcart*,
Sinclar Lord *Sinclar*,
Dowglas Lord *Mordington*,
Semple Lord *Semple*,
Elphingſton Lord *Elphingſton*,
Oliphant Lord *Oliphant*,
Fraſer Lord *Lovat*,
Borthwick Lord *Borthwick*,
Roſs Lord *Roſs*,
Sandilands Lord *Torphichen*,
Leſly Lord *Lindors*,
Elphingſton Lord *Balmerinoch*,
Stuart Lord *Blantyre*,
Areskin Lord *Cardroſs*,
Balfour Lord *Burleigh*,
Drummond Lord *Maddirty*,
Cranſton Lord *Cranſton*,
Melvil Lord *Melvil*,

Napier Lord *Napier*,
Fairfax Lord *Cameron*,
Richardſon Lord *Crawmond*,
Macky Lord *Rae*,
Forreſter Lord *Forreſter*,
Forbes Lord *Pitſligo*,
Mackleland Lord *Kircudbright*,
Fraſer Lord *Fraſer*,
Hamilton Lord *Bargeny*,
Ogilvy Lord *Bamff*.
Murray Lord *Elibank*,
Galloway Lord *Dunkel*,
Falconer Lord *Halkerton*,
Hamilton Lord *Belhaven*,
Sandilands Lord *Abercromby*,
Earl *Carmichal* Lord *Carmichael*, of *Lloynfoord*
Sutherland Lord *Duffus*,
Rollo Lord *Rollo*,
Ruthven Lord *Ruthven*,
Colvil Lord *Colvil*,
Mackdonald Lord *Mackdonald*,
Billenden Lord *Billenden*,
Leſly Lord *Newwark*,
Rutherfurd Lord *Rutherfurd*,
Ker Lord *Jedburgh*, *Marquiſs of Lothian*
Weems Lord *Bruntiſland*.

¶ It is to be obſerved, that the eldeſt Sons of Viſcounts and Lords are deſigned Maſters by their Fathers Titles.

Lord *Theſaurer-deput*,
Lord *Regiſter*,
Lord *Advocat*,
Lord *Juſtice-Clerk*.

This is the Precedency ſtated by the preſent Rolls of Parliament, albeit it is not acquieſced in by all the Nobility: For the Earl of *Sutherland* contends with all the Earles who are ranked before him, and generally ſuch as are diſſatisfied with theſe Rolls, do proteſt whilſt the Rolls are called, againſt ſuch as they conceive are unjuſtly ranked before them. Sometimes alſo the Son has a different Precedency, from what was poſſeſſed by his Father; As the Earl of *Lothian*, who now as ſucceeding to his great Grand-father by the Mother, comes to have his Precedency next to the Earl of *Wigton*, though his Father taking place by a new Patent was ranked as in the above written Rolls. The Juſtice General pretends to

the ſame precedency with the Lord Chief Juſtice of the Kings Bench in *England*, by a report made by the Lord Theſaurer in the Kings name, the 17. *June* 1637. but neither is the Letter to which this report relates extant, nor has he been in poſſeſſion ſince. And it is fit to obſerve, that notwithſtanding of what is ſaid before, *page* 42. (by a Servants miſtake) that the Lord Privy-ſeal takes place with us as in *England*.

The Order of Baronet in *Scotland* was erected for advancing the Plantation of *Nova Scotia* in *America*, and for ſettling a Colony there, to which the Aid of theſe Knights was Deſigned. The Order was onely intended be K. *Ja.* 6. before his Death, for in his firſt Charter of *Nova Scotia*, in favours of Sir *William Alexander*, 10. *Septem.* 1621. And in another Charter granted to Sir *Robert Gordon* of *Lochinvar* of a part of *Nova Scotia*, Deſigned the Barony of *Galloway*, 8. *Novem.* 1621. there is no mention made of this Order: So that the ſame was onely erected by K. *Charles* 1. *anno* 1625. In the ſeveral Patents granted to Baronets, His *Majeſty* did diſpone to each of theſe Knights a certain portion of land in *Nova Scotia*, erecting the ſame in a free Barony with great and ample priviledges, unneceſſary to be inſert here. And moreover, for their encouragement, did Erect, Creat, Make, Conſtitute, and Ordain that Heritable State, Degree, Dignity, Name, Order, Title, and Stile of *Baronet*, to be enjoyed be every of theſe Gentlemen who did hazard for the good and increaſe of that Plantation: And ſo preferred them to that Order and Title, Creating them and their Heirs Male heritable Baronets in all time coming, with the Place, Preeminency, Priority, and Precedency in all Commiſſions, Breeves, Letters-patents, Namings, and Writes, and in all Seſſions, Conventions, Congregations and places, at all times and occaſions whatſomever before all Knights, called *Æquites aurati*, all leſſer Barons commonly called *Lairds*, and before all other Gentlemen: Excepting Sir *William Alexander* His Majeſties Lieutenant of *Nova Scotia*, who (with his Heir, their Wives and Children conform) is not onely excepted in each of theſe Letters-patents granted to the Knights, his Conſorts; But likewiſe the Charter granted to himſelf be King *Charles* 1. 1625. did bear expreſly this exception and proviſion: As alſo, excepting Knights-Bannerets who ſhould be Created under the Royal Standard in His Majeſties Army, and in open War, the King himſelf being preſent, and that during the Bannerets lifetime onely: And with Precedency before all of the ſame Order whoſe Patents are of a poſteriour date. His Majeſty did moreover Declare, and Ordain, That the Wives of theſe Knights, and of their Heirs Male, ſhould have the Precedency aſwell after as before the deaths of their Huſbands, if they ſhould happen to ſurvive, before the Wives of all thoſe of whom the Knights, Baronets, and their Heirs Male had the Precedeny, and even before the Wives of Knights-Bannerets before excepted; (the Degree of Baronet being heritable) And alſo that the Children Male and Female of the Baronets, ſhould take place before the Bairns Male and Female reſpectively, of all perſons of whom the Baronets and their Heirs Male had the Priority: And likewiſe before the Children of the Bannerets; and that the Wives of the Sons of the Baronets, and of their Heirs Male, ſhould preceed the Wives of all perſons whom their Huſbands might preceed, and that aſwell their Husbands being dead as living. And further, His *Majeſty* did Declare, and Promiſe, That whenſoever

the

the eldeſt Sons and appearand Heirs Male of the Baronets ſhould attain to the Age of twenty one years, they ſhould be by His *Majeſty* and his Succeſſours created, *Equites aurati*, or Knights Batchelours, without payment of any Fies or Dues for the ſame, providing they ſhould deſire it. But here it is to be obſerved, that ſome of the eldeſt Sons of Baronets pretend to the title of *Knight* at their Majority, be vertue of this clauſe, without any previous deſire or dubbing, which certainly is an errour, for if they will not be at the pains to deſire it of His *Majeſty*, or His Commiſſioner, they ſhould not aſſume it. Likeas His *Majeſty* did Declare and Ordain, That the Baronets and their Heirs Male ſhould as an additament of Honour to their Armorial Enſigns, bear either on a *Canton* or *Ineſcutcheon* in their option, the Enſign of *Nova Scotia* being *argent*, a croſs of St. *Andrew azur*, (the Badge of *Scotland* counterchanged) charged with an *ineſcutcheon* of the Royal Arms of *Scotland*: ſupported on the *dexter* by the Royal Unicorn, and on the *ſiniſter*, by a Savage or Wild-man *proper*: and for the *creſt* a branch of Laurel, and a Thiſtle iſſuing from two hands conjoyned, the one being armed, the other naked, with this Ditto, *Munit hæc & altera vincit*. And that they and their Heirs Male ſhould in all time coming have place in all His *Majeſties* and His Succeſſours Armies in the middle Battel, near and about the Royal Standard for defence thereof. And that they and their Heirs Male may have two Attenders of the Body for bearing up the Pale, one principal Mourner, and four Aſſiſtants, at their Funerals; And that they ſhould be always Called, Intituled, and Deſigned be the name and title of *Baronet*, and that in all *Scottiſh* Speeches and writings, the addition of *Sir*, and in all other diſcourſes and writings, a word ſignifying the ſame ſhould be preponed to their names and other titles, and that the ſtile and title of *Baronet* ſhould be poſtponed and ſubjoyned thereto in all Letters-patents, and other writes whatſomever, as a neceſſar addition of Dignity, and that each of them ſhould be intituled, *Sir A. B. Baronet*, and his, and his Sons Wives, ſhould enjoy the ſtile, title, and appellation of *Lady*, *Madam*, and *Dame*, reſpectively, according to the uſual phraſe in ſpeaking and writing. And alſo His *Majeſty* did thereby promiſe, That the number of the Baronets aſwell in *Scotland*, as the new Colony of *Nova Scotia* ſhould never exceed the number of 150. :(albeit this number is at preſent ſomewhat augmented) and did likewiſe Declare, That He nor His Succeſſours ſhould never Create, nor Erect in time coming any other Dignity, Degree, Stile, Name, Order, Title, or State, nor ſhould give the Priority or Precedency to any Perſon or Perſons, under the Stile, Degree, and Dignity of a Lord of Parliament of *Scotland*, which ſhould be, or ſhould be preſumed to be Higher, Superiour, or Equal to that of Baronet: And that the Baronet ſhould have liberty to take place before any ſuch who ſhould happen to be created of any ſuch degree or order; and that their Wives, Sons, Daughters, and Sons Wives ſhould have their places accordingly: And that if any queſtion or doubt ſhould ariſe anent their places and prerogatives, the ſame ſhould be decided and judged according to theſe Laws and Cuſtoms, by which other degrees of Heritable Dignities have their priviledges cognoſced and determined. And finally, that none ſhould be created Baronet, either of *Scotland* or *Nova Scotia*, till he had firſt fulfilled the conditions deſigned by His *Majeſty* for the good and increaſs of that Plantation, and until he had certified the ſame to the King by His *Majeſties* Lieutenant there.

Theſe Patents were ratified in Parliament, and were always of this form till the ſelling of *Nova Scotia* to the *French*, after which time they were made much ſhorter, and granted in general terms with all the Priviledges, Precedencies, *&c.* of the former Baronets. And in the year 1629. His *Majeſty* did allow theſe Baronets a particular cogniſance, which will be beſt known by the coppy of the following Letter direct be his *Majeſty*, K. *Charles* the firſt, to the Privy Council here.

"RIght Truſty, and right well beloved Couſin and Counſellour, "Right truſty and well beloved Couſins and Counſellours, and "right truſty and well beloved Counſellours, We greet you well; Where- "as upon good conſideration, and for the better advancement of the Plan- "tation of *New-Scotland*, which may much import the good of Our Ser- "vice, and the Honour and Benefit of that Our ancient Kingdom, Our "Royal Father did intend, and We ſince have erected the Order and "Title of Baronet in Our ſaid ancient Kingdom, which We have ſince "eſtabliſhed and conferred the ſame on diverſe Gentlemen of good quality. "And ſeing Our truſty and well beloved Counſellor, Sir *William Alexander* "Knight, Our principal Secretary of that Our ancient Kingdom of *Scotland*, "and Our Lieutenant of *New-Scotland*, who theſe many years bygon hath "been at great charges for the diſcovery thereof, hath now in end a Colony "there, where his Son Sir *William* is now reſident; And We being moſt wil- "ling to afford all the poſſible means of encouragement that conveniently "We can to the Baronets of that Our ancient Kingdom, for the furtherance "of ſo good a work: And to the effect they may be honoured and have "place in all reſpects according to their Patents from Us, We have been "pleaſed to Authorize and Allow, as by theſe preſents, for Us and Our "Succeſſours, We Authorize and Allow the ſaid Lieutenant and Baronets, "and every one of them, and their Heirs Male to wear and carry about their "Necks in all time coming, an *Orange tannie ſilk ribbon*, whereon ſhall "hang pendant in a *Scutcheon argent*, a *ſaltir azur*, thereon an In- "ſcutcheon of the Arms of *Scotland*, with an Imperial Crown above the "Scutcheon, and incirled with this motto, *Fax Mentis Honeſtæ Gloria*; "Which cogniſance Our ſaid preſent Lieutenant ſhall deliver now to them "from Us, that they may be the better known and diſtinguiſhed from "other perſons; And that none pretend ignorance of the Reſpect due "unto them, Our Pleaſure therefore is, that by open proclamation at "the mercat-croſs of *Edinburgh*, and of all other head Burghs of Our "Kingdom, and ſuch other places as you ſhall think neceſſar, you cauſe in- "timate Our Royal pleaſure and intention herein to all Our Subjects. And "if any perſon out of neglect or contempt ſhall preſume to take place or "precedency of the ſaid Baronets, their Wives, or Children, which is due "unto them by their Patents, or to wear their Cogniſance, We will that "upon notice thereof given to you, you cauſe puniſh ſuch offenders by "Fining, or impriſoning them as you ſhall think fitting, that others may "be terrified from attempting the like. And We Ordain, that from time "to time, as occaſion of granting or renewing their Patents, or their "Heirs ſucceeding to the dignity ſhall offer, that the ſaid power to them to "carry the ſaid Ribbon and Cogniſance, ſhall be therein particularly gran- "ted and inſerted. And We likewiſe Ordain, thir preſents to be inſert

"and

" and Regiſtrate in the books of Our Council and Exchequer, and that " you cauſe Regiſtrate the ſame in the books of the *Lyon King at Arms*, " and Heraulds, there to remain *ad futuram rei memoriam*; And that all " parties having intreſs, may have authentick copies and extracts thereof. " And for your ſo doing, theſe Our Letters ſhall be unto you, and every " one of you from time to time your ſufficient Warrand, and Diſcharge " in that behalf. Given at Our Court at *Whitehall*, the 17. of *November*, " 1629. years.

The order of Baronet in *England* was erected by King *James* the ſixth, for advancing the plantation of *Ulſter* in *Ireland*, and theſe Knights have Priviledges and Precedencie much like to thoſe above ſet down; and there being a Contraverſy for Precedency betwixt them and the younger ſons of Viſcounts, and Barons, managed in preſence of King *James*, it was determined in favours of the younger ſons of Viſcounts and Barons; But at the ſame time it was declared, That ſuch Bannerets as ſhould be made by His *Majeſty* or Prince of *Wales* under the Kings Standard, diſplayed in an Army Royal, As alſo, the Knights of the Garter, Privy Counſellours, Maſter of the Court of Wards and Liveries, Chancellour and Under-Theſaurer of the Exchequer Chancellour of the Dutchy, Chief Juſtice of the Kings Bench, Maſter of the Rolls, Chief Juſtice of the Common-pleas, Chief Barons of Exchequer, and other Judges, and Barons of the degree of the Coif, ſhould have place and precedency both before the younger ſons of Viſcounts, and Barons, and before all Baronets: by which ſome alterations may appear from the Ranking appointed by *Henry* the fourth.

Beſide what has been formerly obſerved in the deſcription of Knights, Baronets. I find that of old a Banneret (or a Ban-rent) has been with us a title higher than a Baron, for by *Act* 101. *Parl.* 7. *Ja.* 1. Barons may chooſe their own Commiſſioners, but Biſhops, Dukes, Earles, Lords, and Ban-rents are to be ſummonded to Parliament by the Kings ſpecial precept; And it is probable that theſe Ban-rents were Knights of extraordinary reputation, who were allowed to raiſe a company of men under their own Banner, but now it is commonly taken for ſuch as are Knighted by the King or Prince under the Royal Standard in time of War. But I conceive that thoſe could not now ſit in Parliament upon the Kings precept, the former Act of Parliament being *in deſuetude*: They have the precedency from Baronets, though their Wives have not, this being but a temporary Dignity, and the other an heritable.

Barons in *England* are Lords with us, but a Baron with us is properly he who has power of pit and gallows; And yet of old I conceive that Lords and Barons were the ſame, for the Statutes of K. *Robert* 1. bear to be made in his Parliament holden at *Scoon*, with Biſhops, Abbots, Priors, Earles, Barons, and others his Noblemen of his Realm: And in Our old Original Acts of Parliament, I find that the Lords and Barons are put in one column undiſtinguiſhed and under the common name Barons; And in the firſt Parliament of K. *Ja.* the 4th. I find the Maſter of *Glames*, i. e. the Lord *Glames*, eldeſt ſon ſitting *inter Barones*. Now the Lords are called the Great Barons, and the reſt are called Small Barons, in the 101. *Act.* 7. *Parl. Ja.* 1. and ever ſince; But yet I find by the 164. *Act.* 13. *Parl. Ja.* 6. every Earl or Lord payes 2000. pounds, for Lawborrows, and every great Baron 1000. pounds; but by great Baron there is meant a Baron of a con-

ſiderable eſtate, becauſe that Act was to proportion the Surety to be found to the eſtate of him who finds the Surety.

The old Barons (or Lairds) amongſt us eſpecially where they are Chiefs of Clans, or the Repreſentatives of old Families that were Earldoms, as *Pitcurr* is of the Earl of *Dirleton*, and as Chief of the name of *Halyburton*, have never ceded the Precedency to Knights-Baronets, much leſs to ordinar Knights. Though the other pretend that a Baron is no name of Dignity, and that Knights-Baronets have a ſpecial priviledge, that there ſhall be no degree betwixt them and Lords, except the Bannerets; And though *militia non eſt per ſe dignitas, Chaſſan. fol.* 344. yet generally it is believed, that next to Knights-Baronets ſucceed Knights-Batchelours, and next to them our Lairds, or Landed-Gentlemen, though a Laird in effect is but the corrupt word of a Lord.

Amongſt ſuch as profeſs Sciences, the Ranking goes thus uncontravertedly, 1°. Such as profeſs *Theology*. 2°. Such as profeſs the *Canon-Law*. 3°. The *Civil-Law*. 4°. *Philoſophy*. 5°. *Medicin*. 6°. *Rhethorick*. 7°. *Poeſcy*. 8°. *Hiſtory*. 9°. *Grammer*. 10°. *Logick*. 11°. *Arithmetick*. 12°. *Geometry*. 13°. *Muſick*. 14°. *Aſtronomy*; *Chaſſan. de gloria mundi pars decima*. And amongſt theſe, ſuch as are Doctors preceed theſe that are not, and amongſt Doctours, the priority goes by Age.

In Towns, Theſe who inhabit Cities are preferred to ſuch as inhabit Burghs, and generally thoſe in the Metropolitan, or capital City are preferred to all the reſt: And thoſe who have born Magiſtracy, are even when their Magiſtracy is over, preferred to all others. And ſo far is this Precedency obſerved, that 1° A younger Alderman or Bailie takes not Precedency from his Senior, becauſe he is Knighted, or as being the elder Knight, as was found in the caſe of the Alderman *Craven*, who though all the reſt of the Alderman were Knighted at the Coronation of King *James*, kept the precedency formerly due to him as Senior Alderman. But though this hold not onely amongſt Aldermen, but that even all Knights of the Countrey, being Burgeſſes of a Town, do cede to theſe who have been their Magiſtrates in it, as to publick meetings relating to the Town; Yet it is doubted whether ſuch a Knight will be oblieged to give place to an Alderman, or Baily in a neutral place. But it is determined in the Heraulds Office of *England*, that all ſuch as have been Mayors of *London*, that is to ſay, Provoſts with us, do take the place of all Knights-batchelours every where, becauſe they have been the Kings Lieutenants.

It is there likewiſe remarked, That Sir *John Crook* Serjeant at Law, was Knighted before any other Serjeant his Ancient, and ſtanding upon Precedency by reaſon of his Knighthood, It was adjudged againſt him by the Judges, *viz.* that he ſhould take place according to his Serjeancy, and not after his Knighthood, yet his wife took her place of a Lady before other Serjeants wives.

The Members of Courts do take place amongſt themſelves according to the precedency of the Courts, where they ſerve; as the Clerks of the Privy Council take place of the Clerks of the Seſſion.

In Families likewiſe, the Chief of the Family takes place of any Gentleman of the Family: And though generally it be believed, that Gentlemen have no precedency one from another, yet Reaſon and Diſcretion do allow that a Gentlman of three Generations, ſhould cede to a Gentleman of ten,

ten, if there be not a very great disparity betwixt their Fortunes, and that for the same Reason almost, that a Gentleman of three Generations claims precedency from any ordinary Landed-man, who has newly acquired his lands.

CHAP. IX.

The Precedency due to Women.

WOmen before their Marriage have Precedency by their Father, but there is this difference betwixt them and the Male-children, that the same Precedency is due to all the Daughters that is due to the eldest, though it is not so amongst Sons; and the reason of the difference seems to be, that Daughters would all succeed equally, whereas the eldest Son excludes all the rest; But if this be the adequat and true reason, then where the Estate and Honours are provided to the eldest Daughter onely, excluding the rest, they ought not to have the same Precedency that the eldest Sister has. And therefore I ascribe this difference rather to the custome of Nations meerly founded upon the respect due to that Sex.

During the Marriage, the Wife regularly participats of the condition of her Husband by the Civil Law, and Law of Nations, *L. 3. C. de Dignitat. Mulieres Honore maritorum erigimus, genere nobilitamus*, and since she was to be sharer in his misfortunes, the Law thought it just that she should be sharer in his Advantages; And the Wife by the Canon Law is called *Socia divinæ & humanæ domus*, and *L. Fœminæ, ff. de Senat.* it is said, that *Fœminis dignitatem clarissimam mariti tribuunt*: But yet this rule has some exceptions, for though in *France* the wives of those who have their Dignities by Offices, enjoy the same Precedency with their Husband, together with a communication of his title, and thus they say there, *Madam la Chanceliere, Madam la Præsidente*: Yet it is not so with us, who think, that Offices are bestowed on Husbands upon a personal account, which is not communicable to their Wives; and yet in some Temporary Dignities, such as that of a Knight-batchelour, the Wife participates of the Husbands title and precedency: Though I find by the Heraulds Records, that this proceeded originally, rather from Courtesie than from Law, and that of old a Knights wife enjoyed onely his Honours during the Spousals, nor were they to be called in Law *Dame Alice*, or *Dame Catherine, &c.* after the Marriage was dissolved.

By our Law likewise, If a woman have Precedency by her Birth, or Descent, she retains still the same, notwithstanding she marry a person of inferiour dignity, contrare to the Rules of the ivil Law; And thus if the Heiress of a Dutchie, or Earldom, marry a Gentleman, she has still the precedency due to a Duke, or Earl, albeit by the Civil Law, *L. 8. de Senat.*

it be expreſt that *Parentes donec Plebeiis nuptiis fuerint copulatæ, &c.* the reaſon whereof is as *Faber* obſerves upon that Law, becauſe it were moſt abſurd that the Wife ſhould have more dignitie then her Huſband; and thus *Livius* obſerves, that *Virginia* daughter to a *Patrician*, or noble *Roman*, was debarred from the Honours due to her Birth, becauſe ſhe had married a *Plebeian*; And it ſeems indeed that he being her Head, it is moſt unnatural that any part ſhould be more honourable then the Head: Nor can there be any thing more contrare to that ſuperiority, given both by the Law of *GOD* and Man to Huſbands, nor any means fitter to make a Wife deſpiſe her Huſband than this is. But I think this precedency has ariſen from the Feudal Law, for the wife having once a noble Fee, ſhe cannot forfeit the ſame by her Marriage, and therefore ſhe muſt retain the dignity that is annexed to it, which is incommunicable to her Huſband, becauſe he is not in Fie. But it is obſervable, that if the daughter of a Nobleman marry another Nobleman, ſhe will loſe the precedency due to her by her Birth, though ſhe would not have loſed it if ſhe had married a Gentleman, and the reaſon of this ſeems to be, becauſe by marrying a Nobleman ſhe receives another Feudal dignity, which ſuppreſſes the firſt.

I find it obſerved in Judge *Cook. lib.* 12. *fol.* 112. that if a *B*aron dies, having divers daughters, the King may conferr upon either of them the title; And thus the Lord *Cromwel* having died without heirs Male, *Burchier* who married the youngeſt daughter was made Lord *Cromwel*, of which we have no example in *Scotland*; for by our Law, if the title deſcend to Females by the Patent, the eldeſt onely can ſucceed to the title, but if it deſcend not by the Patent to Heirs Female, then the King may admit neither to the title, or either as he pleaſes.

After the Huſbands deceaſe, the Wife did by the Civil Law enjoy her Huſbands precedency during her Widowity, but if ſhe marry to a perſon of inferiour quality, ſhe loſes that Precedency, *L.* 8. *de Senat.* which holds with Us and in *England*; And yet ſometimes the King allows her the ſame Precedency, by a Letter, as he does alſo to the daughters of Dukes, and others who have loſt their Precedency by Marriage, which Letters, or Warrands, are direct to the Heraulds Office, and Regiſtrated there. And the Queen never loſes her former Dignity though ſhe marry the meaneſt perſon after the Kings death. And generally, all the priviledges due to the King, are communicated to the Queen, *per L.* 31. *ff. de Leg: Auguſta, autem Legibus ſoluta non eſt, Principes tamen eadem illi privilegia tribunut quæ ipſi habent.* Notwithſtanding whereof, Lawyers think that her Baſtards are not Noble as the Baſtards of Kings, nor does the Womb ever nobilitate. The Countrey of *Campaigne* in *France* onely excepted, where it is ſufficient that either the Father or Mother be Noble, which was allowed to the Ladies of that Countrey, upon the killing of all the Nobility at a great fight, *Papon. de Nobleſ. num.* 3. By the Civil Law alſo, a Widow living leudly, loſes her former dignity, *Arg.* § *Fin. in authent. de reſtit.* but this holds not with us, *vide Bon. de Curt. de Nobilitate, cap.* 12. *num.* 194.

It has been doubted, whether a mean woman marrying a Nobleman, retains the priviledge due to her by her Husband, who has been degraded by forfeiture, or otherwayes, and *Corbin* cites a deciſion, 27. *Auguſt.* 1698. whereby it was reſolved, that ſhe retains ſtill her former priviledge, ſince crimes are perſonal, which is alſo our Cuſtom.

It

It has been likeways doubted abroad, whether a Noblewoman marrying a *Plebeian*, and thereby loſing the Precedency due to her Birth, if ſhe marry a Gentleman in the ſecond Marriage, ſhe will thereby recurr to her firſt Dignity, the perſon be whom ſhe loſt the firſt Dignity being dead; And it was found that ſhe will not, for in Law that which is once extinct does not revive; and therefore Women in ſuch caſes take Letters of Reſtitution, as they call them, or procure a warrand from the King, for that effect as the cuſtom is with us, *ut interveniet Principis reſtitutio quæ plebecitatis maculam abſtergat*, *Traitte de la nobleſſe*, *pag.* 324. But there would be no place for this queſtion here, ſince with us a Noblewoman would not loſe her Precedency by marrying a *Plebeian*, but the doubt behoov'd to be thus ſtated with us, *viz.* Whether a Noblewoman marrying a Nobleman of an inferiour degree, would recover her firſt dignity, ſhe marrying thereafter a Gentleman: Or, whether a Knight-Baronets Lady marrying a Plebeian, could thereafter recover her dignity if ſhe marry a Gentleman. For I conceive a Knight-baronets Lady, does not like a Noblewoman, retain her Precedency when ſhe marries a perſon of inferiour quality, and I think neither of them would recover their former dignity without a ſpecial Warrand.

I find that the Commiſſioners appointed to regulate Queen *Anns* Funerals, did upon the 20. of *May*, 1619. declare, That the Ladies of the Privy Chamber ſhould in time of mourning, take their places as if the Queen were living, till the Funerals were ended, and that the Queens Chamberers ſhould for the preſent Funeral go before Counteſſes women, without prejudice to Counteſſes women, at any time thereafter.

It is fit to obſerve, That the Wives and Daughters of all Dukes, Marqueſſes, Earles, *&c.* do take the ſame place that the Husbands and Sons do, conform to the Precedency formerly expreſt, *pag.* 35. And I find in the Heraulds Office of *England*, an eſtabliſhment ſettled thus amongſt women, by *Jaſper* Duke of *Bedford*, and other Noblemen, by warrand from *Henry* the fourth.

The Wives of Dukes of the Blood Royall.
The Wives of other Dukes.
The Wives of the eldeſt Sons of Dukes of the Blood Royal.
The Daughters of Dukes of the Blood Royal.
The Wives of Marqueſſes.
The Wives of the eldeſt Sons of Dukes.
The Daughters of Dukes.
Counteſſes.
The Wives of the eldeſt Sons of Marqueſſes.
The Daughters of Marqueſſes.
The Wives of the younger Sons of Dukes.
The Wives of the eldeſt Sons of Earles.
The Daughters of Earles.
The Wives of Viſcounts.
The Wives of the younger Sons of Marqueſſes.
The Wives of Barons, (that is to ſay our Lords.)
The Wives of the eldeſt Sons of Viſcounts.
The Daughters of Viſcounts.

The Wives of the younger Sons of Earles.
The Wives of the eldeſt Sons of Barons or Lords.
The Daughters of *Barons.*
The Wives of Knight-bannerets.
The Wives of the younger Sons of Lords.
The Wives of Knight-batchelours.
The Wives of the eldeſt Sons of Knights-bannerets.
The Daughters of *Bannerets.*
The Wives of the eldeſt Sons of Knight-batchelours.
The Daughters of Knight-batchelours.
The Queens Maids of Honour.
The Wives of the younger Sons of *Banerets.*
The Wives of the younger Sons of Knight-batchelours.
The Wives of Eſquiers.
The Wives of Gentlemen.
The Daughters of Eſquiers.
The Daughters of Gentlemen.
The Wives of Citizens.
The Wives of *Burgeſſes.*

From all which it is to be obſerved, that the wife of the eldeſt Son of any degree, takes place before the Daughter of that ſame degree, and both of them take place of the younger Sons wife of the preceeding degree; Thus the Lady of the eldeſt Son of a Marqueſs preceeds the Daughter of a Marqueſs, and both preceed the Ladies of Dukes younger Sons: *Item*, the Wife of the next degree as a Counteſs, preceeds the Lady of the eldeſt Son of the preceeding degree as of a Marqueſs, and the Daughter of a Marqueſs.

3°. This holds not only in comparing degrees amongſt themſelves, but alſo in comparing Families of the ſame degree amongſt themſelves, as for inſtance, though the Marqueſs of *Dowglas* Lady would give place to the Marqueſs of *Huntlys* Lady, yet the Wife of the Marqueſs of *Dowglas* eldeſt Son would take place from the Marqueſs of *Huntlys* Daughter.

4°. Though of old with us in *Scotland*, the Wives of Lords did contend, that they had the Precedency from the Daughters of Earles: Yet ſince that Letter written by King *Charles* the firſt at his Coronation, we follow the cuſtome of *England*, in preferring the Earles Daughter, who takes place immediately after her eldeſt *Brothers* wife.

5°. Though the Daughter of a Marqueſs gives place to the wives of the eldeſt Sons of all Marqueſſes, yet if that Daughter be an Heireſs, and the Daughter of an elder Marqueſs, then ſhe takes place from the wives of the eldeſt Sons of all younger Marqueſſes, as *Segar.* obſerves, *pag.* 240. It is likewiſe obſervable, that ſince this Ranking under *Henry* the fourth, there are ſeveral new additions; For after the wives of Lords eldeſt Sons and Lords Daughters are Ranked, the Wives of Privy Counſellours and Judges, Wives of the younger Sons of Viſcounts, and of Lords or Barons, the Wives of Baronets, the Wives of *Bannerets*, the wives of the Knights of the Bath, and the Wives of Knights-batchelours, *&c.* as in the former Liſt.

Some

Some conſiderable Queſtions concerning Precedency, Reſolved.

QUESTION I.

WHether *in Competitions betwixt Kingdoms, States, and Towns, is their preſent Condition to be Conſidered, or what they were formerly ?*

To which it is anſwered, with this Diſtinction, *viz.* Either the Kingdom, or other places betwixt which Competitions are Stated, remain the ſame that they were in their Subſtantials, and then the former Precedency is ſtill continued; as for inſtance, Though *Rome* whilſt it was a Common-wealth did ſometimes admit of a *Dictator*, who had indeed the power of a King, yet they remained ſtill the ſame Common-wealth; and therefore being the ſame in ſubſtantials, they ought to have the ſame Degree of Precedency continued: Or when two or three Kingdoms are without any alteration United in one, as the Kingdoms of *Scotland* and *England* were United into the Kingdom of *Great Britain*, under Kings in the ſame Race, who ſucceeded to both, as is fully Demonſtrated by *Alb. Gentil. pag.* 82. and this is likewiſe clear from *L. proponebatur ff. de Judiciis & l.* 24. *ff. de Legat.* 1. But where there is a ſubſtantial alteration called by *Ariſtotle* μεταβολη *vel* παρεκβασις there the former Condition is not conſidered, but the κατεστωσα πολιτεια, or preſent condition of the places in Competition is that which ought to be conſidered: And thus when a Kingdom comes to be Conquer'd by a Stranger, and by a Strange and Forreign Nation, there the State of the Kingdom is abſolutely Innovated, eſpecially if the Laws of the State be altered: And therefore the *French* Lawyers are of Opinion, that the Precedency of *England* ought onely to be Computed from *William* the Conquerour, Becauſe, at that time a Stranger and a Strange Nation did conquer the ſaid Kingdom, and the Fundamental Laws of it were much Innovat; and if this be not an Alteration none can be: For the Antiquity of Land cannot give Precedency, for all Land was Created together, and there are few Nations ſo Conqueſt, as that the former people do not remain, ſo that there can be no Precedency upon that account, though ſome who are extravagant in their Zeal for their Countrey doe Argue its Precedency from the firſt Ages of the World; as *Vaſquius* does that of the *Spaniſh* Empire, in deryving it from *Tubal Cain, præfatio in Contraverſ. Illuſt.*

QUESTION II.

Whether a Kingdom becoming a Common-wealth, or a Common-wealth a Kingdom, does their former Precedency remain ?

This Queſtion has two Branches wherein the Difficulties differ, The firſt is, Whether that Town or Place which was a Republick,

having become a Monarchy or Principality, ought it to Retain the Precedency due to the former Common-wealth? And that it ought to Retain the ſame Precedency may be Argued, Becauſe, when one thing is ſurrogat in the place of another, that which is ſurrogat ought to have the ſame priviledge with that in whoſe place it is ſurrogat, *ſurrogatum ſubit naturam ſurrogati*; But ſo it is, that the ſubſequent Principality is ſurrogat in place of the former Common-wealth, and therefore ought to have the ſame Precedency: this Reaſon is likewiſe ſeconded by a Deciſion of *Charles* the fifth, who in the Debate betwixt the Duke of *Florence*, and the Duke of *Ferrara*, did prefer the Duke of *Florence*, becauſe the Republick of *Florence* was formerly preferred to *Ferrara*.

From this Deciſion ſome would diſtinguiſh betwixt the Caſe, where a Citizen of the former Common-wealth is preferred by common conſent of his fellow Citizens, in which caſe they who Governed formerly ſtill Govern, Becauſe they chooſe the new Duke, Prince or King: And the caſe wherein a Stranger comes in and Conquers, in which caſe the former Government is abſolutely Altered, and none of thoſe who Governed formerly continue to Govern: Nor does the Argument of Surrogation hold in this caſe, becauſe that Argument onely holds where one thing is ſurrogat to an other by common conſent, and where the Reaſon of the Priviledge pleaded in the one caſe remains in the other, neither of which can be alleadged where there is a Conqueſt; becauſe there, neither is there a Conſent, nor does the Government, nor State remain the ſame, And conſequently, ought not to have the ſame Precedency, ſeing the ſameneſs of Precedency depends upon the ſameneſs of the State, which ought to have the Precedency.

The ſame is likewiſe to be concluded, where One of the ſame City or Republick Uſurpes the Government; For in that caſe the former Arguments hold: And though *Ariſtotle libro quinto Politicorum* ſayes, *eundem Statum Reipublicæ manere, ubi rem ſuam & ſummam Reſpublicæ ante libera civi alicui ſuo regendam deinceps comittit*, παρα μικρον οτι μεν γαρ εξαπαρτησαντες το πρωτον οκοταν μεταβαλλωσι την πολιτειαν. Yet this requires two conditions, The one is, that one of the Citizens Govern; and the other is, That the Government be tranſmitted to him by the common conſent of thoſe his fellow Citizens who Governed formerly; An eminent Example thereof We find in that famous *Lex Regia*, mentioned *L.1. ff. de Conſt. Princ.* whereby the *Romans* tranſmitted all the power they had to the Emperour, *quæ de Imperio lata eſt qua populus ei & in eum omne ſuum Imperium & poteſtatem contulit*, and upon this account it is, that the *Roman* Emperours pretend the ſame Precedency that was due to the Common-wealth of *Rome*, ſince the Common-wealth did ſurrender and tranſmit to them their power.

The next Branch of the Queſtion is, Whether a Kingdom being turned into a Common-wealth, ought to have the ſame Precedency that was due to the former Kingdom? And it would appear that it ought not, ſince in becoming a Common-wealth, it is Degraded from its former Dignity, Common-wealths being by the conſent of all Nations poſtponed to all Kings, or Crowned-Heads; Nor does the Argument of Surrogation hold in the matter of Precedency, where there is not onely a ſubſtantial Alteration, but a Degradation: The former Argument

gument of Surrogation does not likewiſe take place, where there has an intermediate Impediment interveened: as for Inſtance, Though *Spain* had been formerly a Kingdom, and though *England* was really a Kingdom of old, yet both theſe having become afterwards Provinces to the *Romun* Empire, they cannot Reaſſume the Dignities and Precedency due to them before they were ſubdued, and became Tributaries; ſince that Degradation was a *medium impedimentum*, as Lawyers call it, Which hindred the preſent condition of their Kingdom to be drawn back to its old State: A thouſand inſtances of which may be given in other caſes, and even in the matter of Precedency, If a Family be Degraded, and continue ſo for a long time, if though they be thereafter reſtored; Or if an Earl ſhould reſign his title in the Kings hands, and ſo extinguiſh his title, though he were reſtored, yet he would not be reſtored to his former Precedency, in prejudice of thoſe who had acquired titles *medio tempore*.

QUESTION III.

Whether he who is Elected to a Dignity, ought to have Precedency thereby, as if he were Actually Admitted?

This queſtion has been often Agitated, and may be of great Uſe amongſt perſons of all Degrees: It was firſt Debated in *anno* 1521. betwixt the Ambaſſadours of *Charles* the fifth, who was then Elected Emperour, and the Ambaſſadours of *Francis* the firſt King of *France*, who alleadged, that though *Charles* the fifth was Elected Emperour, yet not being Crowned and Anointed, the Election being but an incompleat Act, could not give him Preference; and that it could not was Argued from theſe Reaſons. 1°. Before the Emperours Admiſſion and Conſecration, he is not called Emperour, but onely King of the *Romans*, and therefore he ought not to have the place as Emperour, for the King of the *Romans* is inferiour to the Emperour, and the Inferiour cannot have the Superiours place. 2°. If Election could give the Precedency, there needed not any further Solemnity; For by the Election, the perſon Elected would be Emperour, for none can have the Emperours place but the Emperour. 3°. That which is Imperfect cannot operat as much as that which is perfect, *L. Ædificia § perfectiſſime ff. de edil. edict.* and that which is Imperfect is judged in Law to be no more, then if it were not, *Imperfectum, & nullum idem ſunt*: And therefore as he could not have Precedency, if there were no Election, ſo neither can he have it, where there is but an incompleat Election. 4°. Where there are two Degrees ſubordinat one to another, the Inferiour Degree cannot aſpire to that which is due to the Superiour; But ſo it is, that Election is but ſubordinat to Admiſſion, *Ergo*, it cannot Operat as much as Admiſſion. Notwithſtanding of all which, I find that *Gothofred.* and others decide for the Emperour, and are of opinion that an Election has in it the Radical Power and Force of Admiſſion, and ſo gives as much Precedency as Admiſſion does; Yet with Us, We ſee that an Elect Biſhop takes not the ſame place, that is due to him after he is Admitted: And therefore the Diſtinction

would be made here betwixt such an Election, as transfers all the power that Admission can, as We see in the Emperour, King of *Poland*, and others, who can receive no more Power after they are Elected, and delay their Coronation and other ceremonies for their own conveniencies; And the case of Bishops and inferiour Magistrates, who are oft-times to receive some further power beyond their Election; and so, their Election not being equivalent to an Admission, it gives not the same Precedency that the other can: and therefore I may conclude generally, that Precedency followes Power and Administration.

QUESTION IV.

Whether ought One who has been twice or ofiner Elected to any Dignity, be Preferred to him who was onely once Elected?

The *Roman* Emperours have differed in this, for the Eldest and the Latest Emperours did think, that such repeated Elections did augment the Dignity to those who were Elected, and thus *Valentinian novel.* 48. and this was likewise *Hadrians* Opinion, as *Spartianus* Observes in his Life: But *Theodosius* the Younger thought, that these repeated Elections did shew the Merit of him who was Elected, but did not augment his Dignity, *repetiti enim fasces virtutem sepe meritam comprobant, non augent, quia nihil est altius Dignitate, L. 1. C. de Consul. vid. Cujac. ad l. illam*, and with this last agrees *Goth. Thes.* 28. With Us if the Precedency be determined by a voice, this holds not, as if one should be Elected to be the first *Alderman*, and another to be a second *Alderman*, this second would not have the Precedency, though he had been ofttimes formerly preferred; But in dubious cases, certainly repeated Elections do prefer: And though the Imperial Dyet has decided Precedency upon this Account amongst Generals of an Army, to him who had been twice formerly a General, though the other had been first a General, as *Goldast.* observes; Yet I find it more Reasonable, that he who was the eldest General, should have been preferred: For that is the mark of greatest Experience, and the not being frequently Elected might have proceeded from want of new Occasions or of Inclination; And it were Absurd to think, that if One had been an old General, and his Commission had continued for many years, that thereafter another, though thrice Elected in a shorter time, should be preferred to him. With Us also, I find that One who has been twice or ofter preferred to be *Provost* or *Mayor*, is preferred to him who has been onely once *Mayor*; and it is Reasonable that they both living in one place, and being preferred by those of the same City, should be preferred in Meetings relating to the same City.

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QUESTION V.

What Influence has the Conjunction of moe Dignities upon Precedency?

There are ſome Lawyers who think, that he who has moſt Imployments ought to be Preferred to him who has but one: And thus they ſay, That he who hath two or three Dutchies, or Earldoms, ought to be preferred to him who hath but one, Even as two or three Lights are greater then one, and two or three Cords are ſtronger then one; And for this they cite *L. Fin. Cod. de edict. d. Adrian.* and of this Opinion was *Menochius, Conſil.* 902. And for this cauſe, *Marz. Conſil.* 26. thought that the Duke of *Ferrara* ought to be preferred to the Duke of *Florence*; And *Navarrus Conſil.* 1. thought that a Cardinal who was a Chancellour ought to be preferred to an elder Cardinal who was not; And that a Doctor of the Civil and Canon Law, ought to be preferred to a meer Doctor of the Civil Law. But yet *Gothofred* is of a contrary Opinion, *cap.* 3. *Theſ.* 2. And in Our Practice the greater Dignity is preferred to many leſſer Dignities, yea, and the Elder in the ſame Dignity is preferred to him who was laſt Promoted to the ſame Dignity, though he have many leſſer Dignities joyned to it; But betwixt two Dignities that are different, if it be not known to which of the Two the Precedency is due, the conjunction of leſſer Dignities with the Dignity contraverted ought to prefer; Even as if it were doubted, which of two Bodies weighed moſt, or which of two Lights ſhined moſt, the leaſt addition to either would certainly caſt the Ballance and alter the Proportion: But if theſe many be all Inferiour to one Imployment, they ought not to be preferred, no more then many little Pearles ought to be preferred to a great one; and yet if it be doubted which of two Pearles are of greateſt Value, the addition of two or three little ones to either, will raiſe the Value of that one to which they are thrown in.

QUESTION VI.

How far do former Dignities Influence a preſent Advancement, and Determine the Precedency depending thereupon? And what Rank is due to Honorary and Extraordinary Offices?

Lawyers give divers inſtances of this, As firſt, a Judge is made a Privy Councellour, but thereafter the Preſident of that Court, where he is a Member or Judge, is admitted to be a Privy Councellour; in that caſe though the other was firſt admitted to be a Privy Councellour, yet the Preſident, though laſt admitted, will have the Precedency, and Vot firſt even in the Privy Council; Becauſe it is indecent, that a Member ſhould have the Precedency, or Vot before his own Preſident: And thus *Papon.* tells Us, it was decided by the Parliament of *Paris, vid. lib.* 4. *tit.* 2. *Art.* 5. which is not unlike what *Vitellius* ſayes, *in Tacitus* 19. *Annal. Fœdum ſi de Honoris prærogativa dimicare cum ducibus audeant, ſub quorum*

ſignis ſtipendia fecerant. A ſecond caſe is, That though a Honorary or Extraordinary Officer will not be preferred to an Officer Ordinary, Yet if a perſon be a Honorary or Extraordinary Officer, before another be admitted to be an Ordinary Officer, if that perſon who was but formerly an Extraordinary Officer, be thereafter admitted to be an Ordinary Officer, he will be preferred to him who was admitted before him, though to an equal Degree; Becauſe, though he was not the firſt Officer in Ordinary, yet he is now equal in Dignity with him, and was an Extraordinary Officer before him: as for inſtance, If One be admitted to be an extraordinary Phyſician to his *Majeſty*, and thereafter become an ordinary Phyſician, he will have the Precedency from them who were Admitted in Ordinary before him, if they were admitted to be Ordinary Phyſicians after he was admitted to be Extraordinary; Precedency being to be taken in that caſe from the Time of the firſt Advancement, *L. 4. Cod. de Conſulibus*: But though this be Obſerved abroad, yet I doubt if it be Obſerved in *Britain*. A third caſe is this, There are two made Counſellors, but he who is laſt Admitted a Counſellor, is firſt Nobilitat, and therefore even as Counſellor he will have the Precedency, though the other was made the firſt Counſellor; And this was ſo decided by the Emperour *Theodoſius*, *L. unica Cod. Theodoſ. de Conſulibus*: and is in Obſervance with Us, amongſt whom the youngeſt Counſellor, being made an Earl, is preferred to elder Counſellors, and though the elder Counſellor be thereafter made an Earl, yet the eldeſt Earl will always be preferred; Though it would ſeem that upon the firſt Counſellors being made an Earl, he ought to be preferred, as in the former caſe where an Extraordinary is preferred, when he becomes to be in equal Dignity with the prior Ordinary Officer. But the Reaſon of the Diſparity is, becauſe Earles are always to preceed according to their Priority, but Officers are not, An Office being but a thing Temporary, and there being no Difference betwixt an Ordinary and Extraordinary Officer, but that the Ordinary has a Sallary, and waits more immediatly upon the King, but yet the Extraordinary Officer was truely of equal Dignity with the Ordinary. Theſe Extraordinar Officers were called *Honorarii ſeu Codicillares*, *L. 9. C. de metatis quibus citra cingulum Dignitas pro ſolo Honore delata eſt*, they had no advantage ſave the Dignity, *Nov. 70. nihil aliud niſi purum Honorem habent*, *L. 7. de Decur.* they are called *inanes umbræ & caſſæ imagines dignitatum.* I have heard this caſe alſo Stated with relation to the ſame quære, *viz.* By the Erection of the Town of *Brichen*, in a Burgh Royal the Biſhop of *Brichen* is firſt to Elect, and then the Town are to Elect their Bailies: From which the queſtion ariſes, Whether if the Biſhop chooſe One who was never a Bailie formerly, and the Town chooſe thoſe who were formerly Elected Bailies, ſhould the Biſhops Bailie preceed? It being pretended, that though he is to have the firſt Nomination, and the choiſe of all, yet that ſhould not give his Bailie or Alderman the Precedency, in reſpect that by the conſtant Cuſtom obſerved by all the Burrowes, when many are Elected to be Aldermen or Bailies at once, he who has been formerly a Bailie preceeds always him who was never.

QUESTION VII.

Whether amongſt ſuch as have equal Dignity, the firſt in time ought to be Preferred?

It is Anſwered, That Generally and Regularly the firſt in Time ought to be Preferred, amongſt ſuch as are equal in Dignity; Which is clear be the Civil Law, not onely in Kingdoms, but in all the Degrees of Nobility and Promotions: And this Our Reaſon may teach Us without Law, for if there were not ſome Certain and Stated Rule whereby Precedencies might be known, it were impoſſible to evite Confuſion, and all other Rules except this are uncertain, but yet this Rule has ſome Exceptions. 1°. Princes of the Blood, *viz.* the Sons, Brothers, Grand-ſons, and Nephews of Kings are excepted from this Rule: For though they be Dukes or Earles of a latter Creation, they are preferred to all of that Dignity. 2°. In *Germany*, if the Chief of a Family come to a Dignity, equal to one of his Kinſmen who formerly enjoyed that Dignity, he will be preferred to him, though his Kinſman did firſt attain to the Dignity; An Example whereof *Gothofred* gives *cap.* 3. *Theſ.* 16. this Exception ſeems to be founded upon the right of Blood, to which thoſe of the ſame Family ſeem to give that Reſpect as to an elder Brother; But though thoſe of the Family may give this Reſpect out of Favour, yet in Law they are not thereto Oblieged; For the Prince being the Fountain of Honour, he onely can give Preference, and his Patent may prefer one Couſin to another, ſince he can beſtow Employments which can prefer a Son to a Father: And therefore in *Britain*, the date of the Patent is onely conſidered.

QUESTION VIII.

When many are Promoted at once in the ſame Write, or when many are Nominate in the ſame Commiſſion, Whether is the Order of Nameing therein expreſt to be Obſerved?

It is anſwered, That Ordinarly he who is firſt named ought to be preferred, *L.* 1. *ff. de Albo ſcrib. Albericus ad L. inter Claras C. de ſum. Trinit.* but though this hold, where the Write wherein many perſons are named is drawn upon Deſign to Prefer thoſe who are named, becauſe, there Promotion being the deſign, It is to be preſumed that the Order of the Promotion was Obſerved, *Gloſſa. ad §. ult. Auth. de Defenſ. Civit. & Clement.* 1. *de Baptiſmo*, yet where the Write had any other deſign, and the Nomination did onely proceed by way of Narration, there an Argument from the Order of Nomination is not ſtill Concluding; eſpecially, Conſidering that ſuch as draw publick Papers are not always verſed in caſes of Precedency

And thus I have my ſelf ſeen old Charters wherein the Chancellour is oft-times placed after the Lord Chamberlain, and both of them after ſome of the Nobility; and if any man will conſider Our Statutes, wherein Commiſſions are granted, they will find this Order very ill Obſerved: And Lawyers conclude this Argument very weak in ſuch caſes, *Everard. in Topicis loco ab ordine num.* 13. *Golſtad. lib.* 1. *cap.* 23. And there are very clear Examples of this given, *cap.* 2. *de Judiciis, cap. Paſtoralis de Conceſſ. prebend.*

But yet in dubious caſes, where the Perſon injured cannot otherwiſe prove his Precedency, this ought to bear great weight, eſpecially, If many ſuch Papers can be ſhewed of one tenour; And if the Office granted by that Commiſſion gives Precedency, above what the perſons therein named could otherwiſe pretend to, then the firſt Nomination has the Precedency: As when Ordinar Gentlemen are named in the Commiſſion of the Privy Council, *&c.* I find alſo by the old Records of Parliament and Privy Council, that the Members of Parliament and Counſellours are in the Sederunts named as they entered into that particular Meetings, but now they are named according to their true Precdency.

QUESTION IX.

In what caſes does Age prefer, and what is its Prerogative in the matters of Precedency?

The Conceſſion of the Prince being the Rule of Honour, he who has the firſt Conceſſion ought to be preferred in the matter of publick Honour, except in three caſes obſerved by *Gothofred. cap.* 3. *Theſ.* 14. Firſt, in caſes dubious. Secondly, where the pretences are abſolutely equal; And thus of the two *Roman* Conſuls, the Eldeſt always preceeded, as *Plutarch* obſerves. Thirdly, to take away Contraverſies amongſt perſons of the ſame Family, but of different Lines. It is obſerved in *Germany* and other places, that the Eldeſt has always the Precedency, as *Golſtad* and other *German* Authours obſerve; And this laſt holds likewiſe with Us, if the Precedency be not clear, and was ſo decided by King *James* the ſixth, betwixt *Blair* of that ilk, and *Blair* of *Balthaiock*.

QUESTION X.

Whether does Appearancy of Blood give Precedency before actuall Inveſtiture and Poſſeſſion?

Though it may ſeem, that ſince *Marquiſats, Earldoms,* &c. being Feudal Honours, conferred oft-times by erecting Lands in a Marquiſat or Earldom, that therefore till the apparent Heir be actually Inveſted, or Infeft as We call it, he ought to have no Precedency; Yet that being expreſly Debated, in *anno* 1608. in the caſe of *Frederick* Duke of *Wirtemberg*,

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it was decided, that the very right of Blood tranſmitted the Precedency: But *Golſtad. Coment. de Reg. Bohem. lib. 3. cap. 6.* is of opinion, That though this may hold where the apparent Heir ſought to be Inveſted or Infeft, and his not being Entered nor Infeft was not his Fault; Yet if he did not ſeek to enter, he ought not to have the Precedency: With Us though an apparent Heir never enter, yet he has ſtill the Precedency due to his Predeceſſor.

QUESTION XI.

Whether does the apparent Heir his Aſſuming and Uſing the Title and Precedency of his Predeceſſor, make him lyable to his Predeceſſors debts, and Infer a Paſſive Title againſt him, as We ſpeak?

To this it is anſwered, That it makes him not Lyable, in payment according to the preſent Curent of Our Deciſions, becauſe Honour deſcends from the King, and is not any lucrative Acceſſion, out of which Debt may be payed, and no man ſhould be made lyable to Debts for enjoying that which cannot pay Debts: Nor does the Son poſſeſs this Title by his Father, but by his Family; And Lawyers have reſolved that *Filius retinet Nobilitatem etiam repudiata hæreditate, Bart. in L. Jurisjur. § 1. ff. de Oper. lib. Jac. & in L. ſi non ſortem ff. de condict. in debit.* But yet this deciſion may ſeem unſuteable to the Analogy and Principles of Law, For 1°. Since Honour is by the firſt Patent and Erection granted to a man and his Heirs, It ſeems Juſt and Legal that none can enjoy the ſame, but ſuch as are Heirs; ſo that this ſeems to be a qualified Right granted by the King, and conſequently, can be enjoyed by none but ſuch as Purge and Purifie the qualities and are Heirs. 2°. We ſee that in other Rights granted to a man and his Heirs, no Succeſſor can have Right without being Heir, and ſince this holds in Acceſſions of the meaneſt Nature, Why ſhould it not much rather hold in Titles and Dignities which are things of great importance? 3°. We have no way nor method to know who is Heir, but by an Inqueſt, after which he who is ſerved Heir is lyable to all Debts, and if he who is to uſe the Title, needs not be found Heir by an Inqueſt, any man may uſe the Title of a Deceiſt Peer, and if two contended for it, this could not be tryed without an Inqueſt and Service. 4°. The making men lyable to their Predeceſſors Debts for uſing his Title, would be very advantagious for the Defuncts Creditors, and it is the Intereſt of the Common-wealth that Creditors ſhould be payed; nor could the apparent Heir complain, ſince he may chooſe to uſe the Title or not as he pleaſes. 5°. It were advantagious to the Common-wealth that none had a Title, but he who had the Eſtate which was given out with it, and out of which it was to be mantained, a Poor Nobility being a great burden upon a Common-wealth and a ruine to it: And I find that the Parliament of *England* did Degrade *George Nevil* from being Duke of *Bedford*, for want of an Eſtate ſuteable to his Dignity, which *Statut. 17. Ed. 4.* expreſſes the inconveniencies here mentioned, which are greater in *Scotland* than in *England*, becauſe Our Peers have more Intereſt

in laying on Taxes than Lords in *England* have. 6°. The Law conſiders not in other caſes, whether the thing uſed by the apparent Heir, may be advantagious to him, Or whether he may pay Debt with it, for the uſing of meer Ornaments, which can yeeld no Money, Or things of the meaneſt advantage, do make him lyable, yea, and he would be lyable though he were a looſer by the thing he uſed; whereas not onely are Honours and Precedency things of great Advantage, and which men would buy at any Rate; But if a man have Liberty once to uſe the Title of his Predeceſſor, it gives him a great Opportunity to inhance his Predeceſſors Eſtate by indirect means: And the former Arguments prove onely that the Blood intereſt as to Honour is tranſmitted without a Service, but not that the Feudal Title of Earl can be ſo tranſmitted.

QUESTION XII.

Whether does the Appearancy of Blood give Precedency, where the Predeceſſor is not Dead?

This is called by the Doctours, *Spes & expectantia ſucceſſionis* κληρονομιας κατ'ελπιδιν and upon this account it is Debated, Whether the Son of a King ought to be preferred to his Brother and all the Peers? And generally, whether the Nephew ought to be preferred to the Uncle who was his Fathers ſecond Brother? And I find it Recorded that *Lycurgus* did decide for himſelf againſt his Nephew, being the Son of his eldeſt Brother: But I would diſtinguiſh here thus, Firſt in the Families of Kings and Princes, all the Kings Children are preferred to the Kings Brothers, and all the Kings Brothers to the Kings Uncles, and thus it was decided in *France* by *Henry* the third, *Rupanus pag.* 508. But formerly the Uncles were preferred by the Conſtitution of *Philip* the *Long anno* 1316. And though in the *Roman* Empire before *Alexius Comnenius* the Emperours Son was ſtill preferred to his Uncle; Yet that Emperour deſiring to put a Mark of Reſpect upon his own elder Brother, preferred him to his Son, and now the Sons of Princes are ſo farr preferred, that not onely they, but all the Princes of the Blood are preferred to all other Peers, though they be laſt Created, as was found by the Parliament of *Paris*, *anno* 1541. betwixt the Dukes of *Neveres* and *Monpenſier*. 2°. If in other Families the Brother be of a Dignity equal to his elder Brother, then the Brother will be preferred to the Nephew; as if the Brother be an Earl, and the Nephew a Lord as being an Earles Son, in this caſe Expectation will not prefer the Nephew, becauſe there are other actual Degrees of Preferrence. 3°. If the Uncle were a Lord by Creation, and the Nephew a Lord by Birth, in which caſe, if the Uncle was a Lord before the Nephew was born, the Uncle ought to be preferred as firſt in Time, but not if the Nephew was firſt born, and thus *Baldus* diſtinguiſhes, *ad L. ut inteſtato C. de ſu. & Leg. Hered.* 4°. If neither the Nephew nor Uncle have any ſpecial Dignity, then the Son of the elder Brother is to be preferred to the Uncle; And this laſt caſe ſhews, that the immediate hope of Succeſſion, or *jus expectantiæ*, is in it ſelf a ground of Precedency, and ſince a man and his appa-

apparent Heir are *una & eadem Perſona* in the Conſtruction of Law, and that in many things that are Diſadvantagious to the Son, he is look'd upon as Heir apparent, in the ſame way as if his Father were dead; it is therefore juſt, that as he has the Diſadvantages of an apparent Heir, ſo he ought to have the Advantages of an apparent Heir: And thus We ſee that Our Statutes having Declared Compriſings bought in by the apparent Heir to be Redeemable by the Defuncts Creditors, It was found that a Compriſing bought in by the eldeſt Son, even whilſt his Father lived, was Redeemable from him and that he was an apparent Heir, in the conſtruction of Law; And therefore ſince the Law puts him in the ſame caſe, as if the Father were Dead, he ought to have the ſame Precedency, and conſequently ought to be preferred to his Uncle, to whom he would certainly be preferred, if his Father were dead. It is remarkable that in *Scotland*, the Uncle was of old acknowledged to be King during not only the Pupillarity of his Pupil; but during the Uncles own Natural Life, which being an Invaſion upon the Natural Right of Our Kings, was abrogated under *Kenith* the third.

QUESTION XIII.

Whether ſhould an elder Brother, who was Born before the Father was Preferred to the Dignity of a King, Marqueſs, Earl, &c. be Preferred to a younger Brother who was Born after his Father had attained to either of theſe Dignities?

Lawyers have varied very much in this Point, For ſome have been of Opinion, that thoſe that are born before the Dignity was attained, cannot pretend to the Precedency due to the Father, for he cannot be ſaid (ſay they) to be the Son of a King, or Marqueſs, whom a King or Marqueſs did not beget; And ſince thoſe who are born before a Crime is committed, looſe not their Dignity by the Fathers committing of the Crime, So by the Rule of Contraries, he who was Born before his Father was Advanced to a Dignity, ought not to participat of that Dignity: This they found likewiſe upon expreſs Laws, *L. ſi Senatus Cod. de Dignitat. L. Imperalis Cod. de Nupt.* and thus *Darius* was preferred to be King of the *Perſians* to *Artabazanes*. Others do more juſtly conclude, that theſe are to be Preferred though Born before the Dignity was obtained; For, if he who was Born in that Condition can be called the Kings Son, he muſt be the Kings eldeſt Son; And it were very abſurd that the Father ſhould be Noble, and the Son not; And if a King had but one Son, he could not be King if this were allowed: and this is moſt clear *L. Senatoris Filium ff. de Senat.* where it is ſaid, That he is aſwell to be called the Son of a Senator, who was Begot before the Father was a Senator, as he who was Begot after; And though this be true as to Succeſſion, and as to the Degree of Nobility in general, yet many Lawyers are of Opinion, that they do not attain to ſo eminent a Degree of Nobility, as if they had been Born after the Father attained to his Nobility; For by the former Law, *ſi Senator natus ex illuſtri ante Dignitatem adeptam, eſt clariſſimus; ſolum natus poſtea, illuſtris*: Others there are who ſay, That theſe who were Born before, may ſucceed

to Honours which deſcended from old Predeceſſors, but thoſe which were acquired in the Fathers own time, ſhould onely deſcend to ſuch as were Born after theſe Honors were acquired. But now generally in *Europe*, and particularly with Us, even thoſe who were Born before the Father attained to any Dignity, do participat of his Dignity, as if they had been born after the ſame was acquired in all caſes.

QUESTION XIV.

Whether ought a Son who is in publick Imployment and Dignified, *to Preceed a Father who is not?*

It is anſwered, That a Son being in publick Imployment ought to preceed a Father who is not. And thus *Fabius Maximus* commanded his Father, to light down from his horſe, when he was to meet him; and was praiſed for mantaining the Dignity of the *Roman* Empire in this caſe: And the Son in this caſe is not a private perſon, but Repreſenrs the Prince or Common-wealth, who are to be preferred to any perſon; and therefore *Laurentius Celſi* was juſtly taxed at *Venice*, becauſe he would not meet his Son when he was newly made Duke of *Venice*, leaſt by being diſcovered before him he ſhould leſſen the Perogative of a Father.

But it may be doubted, Whether though this hold in Employments, it ought to hold in Titles, ſince in theſe the Son Repreſents not the Common-wealth; And therefore in theſe caſes the Laws of Nature ought to prevail above the Laws of Honour, eſpecially, if there be none preſent but Father and Son; But if there be a third perſon preſent who will take the place from the Father, but not from the Son, then the Son muſt preceed the Father; becauſe, though he yeeld to his Father, yet he ſhould not yeeld to a third Party: And it is a general Rule in matters of Precedency, that I muſt preceed you, if I preceed him who preceeds you, which is not unlike that Maxime uſed in other parts of Law, *qui vincit vincentem me, vincit me*.

QUESTION XV.

Whether may he who has the Survivance of Imployment, challenge any Precedency upon that Account?

To this it is anſwered, That he cannot Claim any Precedency: For, though there be there the hope of Succeſſion, and that the perſon to ſucceed be in *actu proximo*, and that likewiſe it may ſeem that he is advanced to a Dignity, and ſo ought to have a Precedency ſuteable to it, and that it may likewiſe ſeem fit for the Intereſt of the Commonwealth, that theſe ſhould be Reſpected and Preferred who are marked out for the Service of the Common-wealth; Yet Law nor Cuſtom have given them no Precedency, for ſince they have actually no Dignity nor Power, they ought to have no actual Precedency: And thus it was found by the Parliaments of *Paris*, and *Tholows* in *anno* 1551. & 1560. that theſe who had Survivances were onely

onely to be preferred, according to the dates of their actual Admiſſion; And ſo theſe who were Admitted to be Councellours or Judges, after they got their Survivance, ought to have the Precedency from them, if they did actually adminiſtrate before them, *vid. Maynerd Notabil. queſt. cap.* 72. *Math. de afflict. deciſſ. Neapolitan.* 1.

QUESTION XVI.

Whether does the Daughter of a Lord, who would himſelf have been an Earl if he had lived, take place from the Daughter of a younger Earl.

It may be alleaged that the Daughter of the Lord ſhould not preceed, becauſe, an Earles Daughter ſhould ſtill preceed a Lords Daughter, and this Ladies Father was never an Earl, nor are We to conſider futur Honours in the matter of Precedency; And as ſhe would not take it in her Fathers time, ſo neither ought ſhe after his death: And as her Father himſelf, being a Lord though an Earles Son, would not have taken place from the younger Earl, ſo neither ſhould the Lords daughter from the Earles daughter, he being a younger Earl then that Lords Father: And I find by the Heraulds Records in *England*, that Sir *Thomas Lees* daughter got a Warrand from the King, to take place as a Lords Daughter, her Father having died before his Father the Lord *Lee*, which proves that ſhe could not have taken place otherwiſe, and this is commonly receiv'd in *England*. But yet it may be Debated, That the Daughter of that Lord ſhould have the Precedency, ſince her Father would have been an elder Earl; And though ſhe could not take place during her Grand-fathers time who was the elder Earl, yet *per jus accreſcendi*, and the right of Repreſentation, ſhe comes after her Grand-fathers death, to be the Daughter of the elder Earl, for Honour is but a part of Succeſſion; and therefore as ſhe might have right to her Fathers Succeſſion, if ſhe have not Brothers, ſhe may by the ſame reaſon have Right to the Honours: And it were very ridiculous to Argue ſo, as that her elder Brother (if ſhe had any) might take place as an Earles Grand-child, and that ſhe could not take the ſame place as his Siſter; and conſequently, ſince he would take the place of that younger Earl, ſo ſhould ſhe of that younger Earles Siſter or Daughter: And the Reaſon why ſhe comes to a higher Degree of Precedency by the death of her Grand-father is, becauſe by the right of Repreſentation her Fathers Family comes in the Grand-fathers place. And to ſhew, that this Argnment, *viz.* Your Father had not the Precedency of me, therefore you cannot have it of my Daughter, is a weak Argument in caſes of Repreſentation, may appear from this, That if it were a good Argument, the younger Earl might aſwell ſay to that Lords Son, Your Father never took the place of me, ſo neither can you; And though it may be Anſwered to this Argument, that the Diſparity betwixt the Brother and Siſter lieth in this, That the Son Repreſents the Grand-father, but the Daughter does not; Yet if We conſider it nearly, even this Anſwer is Fallacious: For though the Daughter Repreſents not the Grand-father, yet the Fathers Family Repreſents the Grand-fathers, and ſo participats all the Honours of the Grand-

fathers Family by that Repreſentation; And as the elder Brother becomes an Earl, Becauſe, if his Father had lived he had been an Earl, ſo ſhe ought to have the Precedency as an Earles Daughter, becauſe her Father would have been an Earl for the ſame Reaſon.

QUESTION XVII.

Whether if the elder Brother be Mad or Dumb, &c. does the ſecond Brother get the ſame Precedency, as if his Brother were dead?

I have heard this caſe much Debated, ſome Contending, That ſuch as were Incapable of ſucceeding, were to be Reput as dead, *& per cap.* 1. *an Mutis Surdis*, it is expreſly declared, that ſuch as are born Deaf or Dumb, or are naturally Idiots ſhall not Succeed: But others thought that even theſe are to Succeed, but have onely their neareſt Agnats given them for Curatours, and ſo they are Heirs; And conſequently, the Precedency is not due to their neareſt Friends during their Life, and they may have children who would exclude their neareſt Agnats. I find ſome Lawyers diſtinguiſh betwixt ſuch Defects as are Natural, and follow the Havers from their Birth, and theſe Defects do Exclude from the Succeſſion, ſo that the next Heir has the ſame Precedency, as if his elder were dead, if the Succeſſion be of Kingdoms, or Fews that have a Dignity annexed to them: But in private Rights, and where the Defects are Accidental, they aſſert that the Right remains with the Heir though *defectuus*, and conſequently he retains alſo the Precedency, *Tiraquel. quæſt.* 23.

QUESTION XVIII.

Which of two or moe Twins ought to Preceed, when it is Contravcrted which of them was firſt Born?

We have a remarkable inſtance of this, *Gen.* 38. where the Mother deſired the Scarlet threed to be bound about his wreſt who ſhould be firſt Born, and as to this point Lawyers have differed very much, For ſome think that the Eſtate ought to be devided amongſt the Pretenders, if it be diviſible of its own Nature; Or if it be indiviſible the Superiour may prefer either he pleaſes, if the Succeſſion be of a Few; Or the Deciſion may be referred to Lot in privat Perſons; Or to the Vote of the Repreſentatives of the Kingdom, if the Succeſſion be to a Monarchy. Some likewiſe are for the Brothers poſſeſſing by turns and alternately: and though one Witneſs be not ſufficient generally to Eſtabliſh the Right of Succeſſion, yet if any one Woman was onely preſent, her Teſtimony would certainly prefer either, neceſſity forming it ſelf into a Law here as in other caſes, *vid. Tiraquel. de Jur. primi Gen. quæſt.* 17.

QUEST.

QUESTION XIX.

Whether do Natural Children Born before a Lawful Marriage preceed? And ſhould they be preferred to the Children Born in a Lawful Marriage, if they be Legitimated thereafter?

This caſe did exiſt in a moſt illuſtruous inſtance in *Scotland*: For King *Robert* the ſecond having begot a Son upon *Elizabeth Mure*, he thereafter Married *Eupham* Daughter to the Earl of *Roſſe*, and had by her the Earles of *Strathern*, and *Athol*; after which having married the ſaid *Elizabeth Mure*, that Marriage did Legitimate her Children, and by Act of Parliament her Children were, by a Recognition and acknowledgement of Parliament, preferred to the Children Born in the Lawful Marriage. The Reaſons *pro* and *contra*, urged in that Debate at that time are now unknown; But the Arguments which might have been urged in the caſe, are, 1°. That a Son ſo Legitimated would ſeclude without all Contraverſie all Uncles, and other Agnats, Therefore by the ſame he ſhould Seclude his other Brothers, § *ſi quis autem defunctis Authent. quibus mod. nat. cap* 1. *qui Filii ſunt legit.* 2°. Legitimation is Retrotracted and drawn back to the time of the Nativity, *cap. tanta qui fil. ſunt legit.* and Legitimation puts the Perſon ſo Legitimated in the ſame Condition as if he had never been a Baſtard, *L. ſi quis Filio* § *pen. ff. de injuſt. Teſt.* and this is beſtowed as a particular Reſpect upon Marriage and its Sacred Character, and to invite men to make Satisfaction for the wrong they have done. 3°. By the *Roman* Law thoſe that were born in Captivity were not capable of Succeſſion, but how ſoon they were Ranſomed and had returned, they were reſtored to the Right of *primo-genitor*, and preferred therein to thoſe who were thereafter born at *Rome*: And therefore ſince ſuch was the Force even of a Civil and unreaſonable Fiction, much more ought greater Force to be allowed to Legitimation, which is founded upon ſo Juſt and Pious Principles. 4°. *Quo-ad* the Right of Succeſſion, the time of the Defuncts death to whom he is to ſucceed, does regulat the quality of the Succeſſion: And therefore ſince the Perſon Legitimated was capable of Succeſſion the time the Defunct died, and was then likewiſe the eldeſt, he ought to Succeed as eldeſt, whatever his Condition was the time of his Birth, *L. poſt Conſanguineos* § *proximam ff. de ſuis & Legit. nec enim prius debet de cujuſque conditione queri quam hæreditas vel legatum ad eum pertineat, L. in opportet. ff. de Legat.* 2. 5°. The eldeſt Son was always eldeſt, and was onely hindred from this Right of *primo-genitor* and Precedency, by the Legal imperfection of his Birth, and therefore this impediment being removed by the ſame Law which put it, his Birth-right continues intire.

But whether this Priviledge ſhould be granted to ſuch as are Legitimated by the Prince, and not by the ſubſequent Marriage, may be doubted? And I incline to think it ſhould not, becauſe the ſpecial Reaſon of the former Conceſſion depends upon the Favour and Honour of Marriage; and this is likewiſe clear, *cap. & quoniam Auth. quib. mod. nat. vid. Imolam. in cap. Grand. de ſup. negl. Prælat.* And my ſecond Argument is, That

the Prince cannot by any deed of his prejudge third Parties; But here ſuch a Legitimation, would prejudge the Children of the intermediate Lawful Marriage.

QUESTION XX.

Whether ought the Order of the Nomination to be Obſerved in Commiſſions, where the Perſons are Ranked otherwayes then can be conſiſtent with the Kings former expreſs Grants?

An inſtance of this may be given in this caſe, *viz.* The *Mayor* or *Provoſt* of a City being Patron of a Colledge within their own Town, His *Majeſty* grants a Commiſſion for viſiting that Colledge, wherein he names firſt the Biſhop, then the Mayor, *&c.* The queſtion may be moved whether the Biſhop ought to preceed, becauſe he is firſt named; or the Mayor becauſe he has moſt intereſt, being Patron, Who may likewiſe alledge, that the Biſhops Nomination proceeded onely from the Ordinary Cuſtom of naming Eccleſiaſticks firſt.

As alſo, If in a Commiſſion of Juſticiary, three Lords of the Seſſion being named, and the youngeſt of the three being firſt named in the Commiſſion, It may be doubted, whether the Seniority formerly acquired in the Seſſion ought to be Obſerved, and give Precedency in Sitting and Voting; or if they ought to Sit and Vote, according as they are named in the Commiſſion: And it may be alledged that the Seniority in the Seſſion ought to be Reſpected, there being a right of Precedency thereby acquired, which cannot be prejudged by a Nomination, which might have proceeded upon miſtake; ſince it is not to be preſumed that His *Majeſty* would Degrade any whom He continued otherwiſe in ſo eminent a Dignity: And as if two Brothers were named in a Commiſſion, the elder would ſit and vote firſt, though the younger were firſt named, that inverſion being preſumed to proceed from Errour; ſo ought the ſame to be obſerved amongſt Judges who are in effect Brothers. Some likewiſe uſe to Argue in ſuch caſes from the reiterated Order of Nomination, and think that if the Perſons Commiſſionated be oft named after the ſame Order, that the Order of Nomination in that caſe is preſumed to have proceeded from an expreſs Deſign of giving Preferrence, and this they call *argumentum a geminatione actuum*; But in my judgement it is no infallible Argument, for theſe Repetitions proceed in courſe.

QUESTION XXI.

In the Competition betwixt two who are Advanced at the ſame time, but in different Writes, As if two Patents were ſubſcribed by His Majeſty *to two ſeveral Earles on the ſame day, which of the two were to be preferred?*

In anſwer to this, It is generally concluded, that though both be granted on the ſame day, and in the ſame hour, the Priority of His *Majeſties* Sub-

Subſcription would prefer him in whoſe Favours His *Majeſty* did firſt ſuperſcrib; which may be cleared by His *Majeſties* own Declaration, for he being the fountain of Honour, he is the onely fit Judge in all Controverſies concerning it, or if his *Majeſty* do not remember, the Declaration of His Secretary is undoubtedly to be believed, *nam in his quæ attingunt officium, officium gerentibus eſt credendum*; But if both His *Majeſty*, and His Secretary were dead, ſome think that there were place left for the ſucceeding King to gratifie either, ſince the compleating of Rights depends abſolutely upon him, who is the firſt Granter: And by the Feudal Law, and Ours, if Reſignation be made ~~at the ſame time~~ in the Superiours hands, in favours of ſeveral Perſons at the ſame time, *locus eſt gratificationi*, as *Craig* alſo tells Us, and he may prefer either as he pleaſes.

Some contend that where ſeveral Patents are granted in the ſame day, the King may prefer either, though it be known which of the two Patents were firſt ſigned and ſuperſcribed: For in Law, where the difference of time is ſo little, the Law looks upon it as no Difference at all, *nam de minimis non curat prætor*, and *Albericus* who has write a Treatiſe *de minimis*, is of this Opinion, and We ſee that the Law in other caſes brings in equally ſuch as approach ſo near one another in time, nor can the King be ſaid to be *functus officio*, and to have denuded himſelf of the power of Preference, where the right of Preference is ſo ſmall; as when the King ſuperſcribes both the Patents at the ſame time, as that he does not intermix any other buſineſs, *nec divertit ad alium actum*, there indeed it ſeems that neither can claim Preference by the Priority of Signing, ſince it appears His *Majeſty* had no deſign of Preferring the one to the other, and papers are ordinarly preſented to him by accident, as they fall in courſe. It may then be alledged, that in ſuch dubious caſes, where Preference cannot be known from the ſuperſcription of the Patents, and where His *Majeſty* does not Declare the Preference by any poſterior Act, but leaves both Parties to the Common Law, that there he who had the Precedency before theſe Patents ought to be continued in the Preference, ſince in all dubious caſes the Law ſtill prefers the Poſſeſſor, *& ſemper in caſu dubio pro poſſeſſore reſpondendum*; Nor can it be imagined that His *Majeſty* deſigned to Degrade a perſon whom He hath actually Preferred; But ſo it is, that to poſtpone a man to him to whom he was formerly preferred, is ſomewhat to Degrade him: And ſince Accumulation and Conjunction of Titles has very many effects in the caſe of Preference, the leaſt effect it can have, is to prefer the Haver in ſuch a dubious caſe.

I likewiſe conceive, That if two Patents were given at the ſame time, One to a Perſon who had ſerved His *Majeſty*, and much more to an actual Domeſtick, and the other to a Perſon who had not ſerved, nor were no Domeſtick, that in theſe caſes he who had ſerved, or were a Domeſtick would be preferred, becauſe of the preſumed affection of the Prince, and the former Service of the Receiver.

QUESTION XXII.

Whether is Precedency to be Ruled according to the date of the Proviſion, Inveſtiture, or actual Poſſeſſion?

There are three ſeveral times from which ordinarly Precedency is computed, The firſt is the time when the Honour is firſt granted, which is called by Lawyers *tempus proviſionis*, If the Advancement be of one ſingle Perſon to a ſingle Dignity; or *tempus Cooptationis*, if the Perſon Advanced be aſſociated into any Society, as to be One of moe Judges, *&c.* The ſecond period of Time, is the time of the Inveſtiture, as when a Nobleman is brought in in his Robs. The third is, the time when he apprehends actual Poſſeſſion.

Theſe who write upon this Subject do conclude, That Precedency is to be given not from the time of Promotion or Proviſion, but from the entry to Poſſeſſion, ſo that he who is laſt Provided or Dignified will have Precedency, if he firſt actually apprehended poſſeſſion, *Bald. in cap. cum olim. de conſuetud. Gothofred. de Preced. cap. 3. num.* 18. and thus he obſerves the Courts of *Rome*, *Paris* and *Tholows* to have decided, and for this he cites *l. ult. ff. de Excuſat. Tutor. l.* 1. *Cod. Theod. quis in Grad. Prefer.* and ſince Adminiſtration is the end of that Advancement, the Act is not Compleat till then.

Though this hold in Honours which require Adminiſtration, ſuch as the being in a Judicatory, *&c.* Yet it holds not in Honours where no Adminiſtration is requiſit, And thus, if two be Advanced to be Earles, he whoſe Patent is firſt paſt the Kings hand will have the Precedency, though the other ſerve in the firſt Parliament, or be preſent there a day before the other, or have his Patent firſt Regiſtrat; for it is the King, and not his Clerk, that makes Noble, but yet this is Debated by *La Rocque, cap. 66.* Lawyers likewiſe Obſerve that the former Rule, preferring him who has firſt Served to him who was firſt Provided or Inveſted, holds good, though he who was firſt Provided or Inveſted was not *in mora*, and did not delay to take Poſſeſſion, but was hindred by ſome extrinſick Impediment, ſuch as Sickneſs; And this they ſay was decided the 27 of *April*, 1594. *in Rota Romana*, and this is obſerved to be the common Opinion by *Gonzales ad regulam* 8. *Cancel.* and this they prove by the Analogy of other Feudal Rights, which being to be compleated by Poſſeſſion, the Law conſiders not whether the Party who ſhould have poſſeſt was hindred from attaining to Poſſeſſion, but who firſt attained to Poſſeſſion.

QUESTION XXIII.

Whether does the Dignity of him who beſtows the Honour, Regulate the Precedency that is beſtowed among Equals?

It is anſwered, That it does, all other things being Equal; and thus

those

thoſe who have the ſame Dignity from a King, as for inſtance, Thoſe who are made Knights by a King are preferred to thoſe who are made Knights by a Common-wealth; And amongſt Common-wealths, thoſe who are made Noble by the greater Common-wealth are preferred, to thoſe of the ſame Degree made Noble by a leſſer Common-wealth, *Gloſſ. ad L. 2. de Alb. ſcribend. Menoch. Conſil.* 126. *Lauderus de Dignitat. Concluſ.* 32. and this holds ſo farr, that the youngeſt Knight admitted by the one is preferred to the eldeſt admitted by the other: But Knights admitted by a Commiſſioner, are not upon this account to be poſtpon'd to thoſe made by the King himſelf, ſince they are in the Conſtruction of Law admitted by the ſame Dignity, *& qui facit per alium, facit per ſe.*

It is very obſervable, that the *French* King prefers the Dukes made by the Emperour, not onely to the Dukes made by himſelf, but even to the Ambaſſadours of Forreign Kings; though I think this is allowed onely to theſe Dukes, who are Sovereign Princes. By this rule likewiſe it is, that the Clerks of a Superiour Court are preferred to theſe of an Inferiour, ſince they derive their power from a higher Juriſdiction.

QUESTION XXIV.

Whether can a Prince Nobilitat any of his own Subjects in the Territories of another Prince?

It has been Argued that he cannot; becauſe he cannot beſtow Honours; but where he is a Prince, but ſo it is, that he is not a Prince, at leaſt hath no power in the Territories of another Prince: Which Opinion ſeems to be founded on *L. ult. ff. de Off. præſect. Urb.* and therefore *Sigiſmund* the Emperour having deſigned at *Lions* in *France*, to Creat the Earl of *Savoy*, Duke of *Savoy*, he was reſiſted by the Governour of *Lions*, till the *French* King ſhould be advertiſed; And *Charles* the fifth having whilſt he was Emperour, Created ſome Lords and Knights in *France*, though at the deſire of *Francis* the firſt the *French* King, their Creation being thereafter Contraverted by their Peers, It was found Illegal: But yet I incline rather to *Noldus*'s opinion *de Nobilitate c. 2.* who thinks that a Prince may Exerciſe any Voluntar Juriſdiction without his own Dominions, eſpecially in Relation to his own Subjects, *L. 1. ff. de Officio pro Conſul. Bartol. in L. 1. Col. 9. La Rocque triact de la nobleſſe, c.* 76. and if they ſhould attempt againſt his Life, they would be guilty of Treaſon, though the attempt was made in a Forreign Nation. Lawyers likewiſe have allowed to Princes all manner of Juriſdiction, even within the Dominion of others: And therefore I much admire, how theſe Honours that were beſtowed by *Charles* the fifth, could have been thereafter contraverted, if the perſons to be Dignified were the Emperours own Subjects; but I believe they were not.

QUESTION XXV.

Whether when the Preſident of any Court or Incorporation is abſent, may the eldeſt Member Convocat the Incorporation? And who ought to preceed in that Caſe?

To the firſt of theſe queſtions it is anſwered by ſome Lawyers, That the Preſident being abſent, the eldeſt Member in Dignity, may by his own Authority call the meeting *Convocare Collegium*, as they call it, and of this opinion are *Hoſtienſis*, *Panorm. Bald. ad cap.* 1. *de Major & Obed:* but others are of opinion that the Major part has only right to conveen the reſt in that caſe *Innocent. ad cap.* 2. *de operi. nov. nunc.* But a third Sect of Lawyers do, for agreeing the former opinions, aſſert that in Eccleſiaſtick meetings, the eldeſt may by his own Authority call the reſt, but not ſo in Laick meetings; and the reaſon of this Diſtinction ſeems to be, becauſe Churchmen are bound to give more Obedience to their Seniors, and there is leſs fear of Deſign amongſt them, both becauſe they are preſumed to be more diſintereſted, and becauſe in their meetings their Poſterity is not to gain: But without any Diſtinction I ſhould think, that the eldeſt may always Convocat, for there may be hazard in delay, if the greater part were requiſit, for the queſtion ſtill recurrs who ſhould call the greater part, nor can there be great hazard in calling, for the onely hazard is the packing of a Quorum, and this may be prevented, by impoſing a neceſſity upon thoſe who meet to advertiſe the reſt.

To the ſecond queſtion it is anſwered, That this is much to be determined by Cuſtom, and Our Courts in *Scotland* ſuffer not the eldeſt to preceed, but chooſe alwayes one to preceed in the abſence of their conſtant Preſident; and this ſeems to be moſt Reaſonable, becauſe every Member of a Court is not ordinarly fit to be a Preſident: And yet there are ſome Lawyers who diſtinguiſh betwixt ſuch Courts, to whom the chief Magiſtrat has choſen no conſtant Preſident; and in theſe they ſay the eldeſt cannot preceed, though they ſay he ought to preceed in theſe Courts where the King has chooſ'd a Preſident, for as in theſe the members cannot chooſe a conſtant Preſident, ſo neither can they chooſe a Vice-preſident, ſince *ſurrogatum ſubit naturam ſurrogati*, whereas the eldeſt is a Preſident by the Magiſtrates tacit Election, ſince he has that Seniority from the King, or ſupream Magiſtrate, which does prefer him to be Preſident: and we ſeethat amongſt Souldiers, the eldeſt Officer alwayes commands, when the ſuperiour Officer is abſent.

QUESTION XXVI.

Whether may a Peer be Degraded, becauſe he hath not an Eſtate ſufficient to entertain a Perſon of his Quality? And by whom may he be Degraded?

It would ſeem that a Peer cannot be Degraded, though he hath not a ſuteable Eſtate, becauſe the King may Nobilitate a perſon that wants an Eſtate,

Eſtate, and Nobility being a right derived from Blood, it ſeems to have no Dependance upon Riches, and as the having of Riches gives not Nobility, ſo neither ſhould the want of them take it away; Likewiſe this is very expreſs by the *Roman* Law, *Lege humilem, Cod. de Inceſt. nupt.* where it is ſaid, *humilem & abjectam fœminam non eam eſſe quæ licet pauper ſit ab ingenuis tamen parentibus nata eſt.* And that this hath been very anciently the opinion of the World, is clear from that of *Euripides, apud Stob. ſerm.* 86. σεμνὸς γὰρ ἐκ σεμνῶν ἀπόλλυται τὸ τῦ πατρὸς γενναῖος.

But I find that *Cook* 4. *inſt. folio* 355. and the Authour of *Jus Imaginis, pag.* 25. conclude that Poverty is a good cauſe for the Degrading of a Peer, an inſtance whereof, they give in *George Nevil* Duke of *Bedford*, who was Degraded by Act of Parl. 17. *Edward* the fourth, of which Act this is the tenour, *And foraſmuch as it is openly known, that the ſaid* George *hath not, nor by Inheritance may have any livelyhood to ſupport the ſaid Name, Eſtate, and Dignity, or any name of Eſtate, as oftentimes it is ſeen, that when any Lord is called to high Eſtate, and have not livelyhood convenient to ſupport the ſame Dignity, it induceth great Poverty, and Indigence, and cauſeth oftentimes Extortion, Embracery, and Maintenance to be had, to the great trouble of ſuch Countries, where ſuch Eſtate ſhall happen to be inhabited; Wherefore the King by Advice of his Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, Ordaineth, Eſtabliſheth, and Enacteth, that from henceforth the ſame Erection, and making of the ſame Duke, and all the names of Dignity to the ſaid* George, *or to* John Nevil *his Father, be from henceforth void, and of none effect*, &c.

From which Act three things may be well obſerved,

Firſt, That the ſaid Duke had not any Poſſeſſions to ſupport his Dignity, yet his Dignity could not be taken away from him without an Act of Parliament.

Secondly, The inconveniencies appear, where a great Eſtate or Dignity, is not accompanied with a livelyhood.

Thirdly, This is a good Cauſe to take away the Dignity by Parliament.

For reconciling which opinions, it ſeems indeed, that though a perſon who is noble by Birth ſhould fall into poverty, yet that poverty can no more Degrade him from his Nobility, then it can taint his Blood; but though it cannot root out that Noble Character from his Blood, and make him no Gentleman, yet it ſeems a good reaſon why he may be Degraded from being a Peer of the Realm: For the being a Peer, is no neceſſar effect of Blood, but a mark of the Royal bounty, beſtowed for the better Government and Advantage of the Kingdom, Earles being by their Original *Præpoſiti Comitatus*, or Commanders of the County, and Counties or Shires are ſo called, becauſe they are the Governments of a Count or Earl: And therefore when the King and Parliament find that they are not fit to bear this quality, they may juſtly take away that Honour that was given, nor can there be any thing ſo inconvenient, as that theſe ſhould repreſent the Kingdom in its greateſt concerns, and burden it with with Taxes, who have no intereſt in the one, nor can bear any ſhare in the other. And that theſe Feudal Dignities and markes of Nobility may be taken off by the loſs of the Fews, is clear by *Bartolus in L. inam. Cod. de Dignitatibus*, and that this is the cuſtome of *Sicily* is clear, *Afflictuſ. Col. non. in 6. not.*

It may likewiſe ſeem reaſonable, that as the King onely can beſtow Nobility, ſo that it ſhould be onely proper for him to Degrade; And ſince he may Create any Nobleman though he be poor, ſo he may continue him ſo, notwithſtanding of his Poverty, ſpecially ſeing the being a Peer is but to be the Princes Counſellour, nor can any judge who are fit to be his Counſellours, but himſelf; nor is the Parliament any thing but his great Council: But ſince this Degradation is a kind of Forfeitur, it ſeems that the Parliament onely can be Judges therein, ſince the King does not uſe to Forfeit by his own Authoritv; And though the former Arguments may prove that a Peer cannot be Degraded for poverty, except the King pleaſes, which is certainly true, ſince no Act of Parliament can paſs without his Royal conſent, yet they prove not that the King may Degrade a Nobleman by his own Authority, except he may Judge all caſes immediately by himſelf.

QUESTION XXVII.

Whether is a Patent never made uſe of by the Father, valid after his death?

It is anſwered, That though the Patent being granted to ſuch a man therein Deſigned ſeems to die with him, and that the Father dying with this quality cannot tranſmit it to his Son, yet it is certain, that the Patent is valid to his poſterity: For except where it was Deſigned to be perſonal, it is conceived in Favours of a man and his Heirs; and thus it was judged in the cauſe of *Queſnel* Advocat in *Rowan*, 4. *May* 1623. *vid. La Rocque cap.* 67.

QUESTION XXVIII.

Whether if the Father uſe any low or baſe Trade which Derogates from Nobility, will his Children and Deſcendents looſe it thereby?

In anſwering to this caſe, We muſt diſtinguiſh betwixt ſuch as derive their Nobility from their Fathers onely, and ſome think that in that caſe, the miſbehaviour of the Father does extinguiſh the Nobility of the Race, and that the Deſcendants are no more Noble, except they be reſtored by an expreſs Gift; Or otherwiſe the Nobility of the Race has deſcended from a long Series of Predeceſſours, and then the Fathers Deed does not prejudge them, ſince they do not owe their Nobility to him, and the Prince having Nobilitat ſuch a man and his Poſterity, they owe their Nobility to the King, and derive it from him equally with the Father, which Diſtinction I find in the Learned *Faber. Cod. L.* 9. *T.* 28. *Def.* 1. But it ſeems that by this laſt reaſon, Even that Nobility which is begun in the Father cannot be loſt by his fault: And therefore ſome Lawyers have been of Opinion, that that Nobility which deſcends by immemorial poſſeſſion, and which flows not from a particular priviledge and Conceſſion, can never be taken away by the Fathers baſeneſs or crime, *Warnæſius tom.* 1. *reſponſorum*

rum de Jure Pontificio Conſil. 20. *num.* 7. and thus we find in the *Roman* Story, that *Marcus Emilius Scaurus* was found not to have loſt his Nobility by his Fathers becoming a bearer of Coals, *Curt. conjectur. Jur. civil. lib.* 2. *cap.* 20. and others think that as it is ſufficient for acquiring Nobility, that the Grand-father and Father have been repute Noble; So by the rule of Contraries, it is ſufficient for extinguiſhing Nobility, that the Father and Grand-father have been repute Ignoble; And though the rights of Blood cannot be loſt by preſcription, yet Nobility may be loſt, as all other priviledges can, by not exerſing or owning it time out of mind.

It is fit to know, that in this Iſle not onely that Nobility which comes by Succeſſion and Immemorial poſſeſſion, but even that which comes by priviledge and Conceſſion can be Forfeited by the Fathers Crime: and in this We differ from *Warneſius* opinion, and therefore the Children muſt be rehabilitat and reſtored by the King; But the Fathers unworthineſs in exerciſing mean ſhifts and Trades, does not amongſt us Derogate from the Childrens Nobility, as in other Nations; Nor do I ſee any reaſon for the diſtinction uſed by *Warneſius*, for all Nobility muſt be acknowledged to have flowed originally from the King by Conceſſion, and even that Nobility, which comes by priviledge, does deſcend upon the Children by the Kings grant to them aſwell as the Father, and ſo cannot be prejudged by any perſonal deed of his, except in the caſe of a Crime againſt the King, for that is ſtill implyed in the Conceſſion, and it is not juſt that the Children of Traitours ſhould enjoy thoſe titles, and that Nobility which might be uſeful to them in revenging their unjuſt quarrels.

QUESTION XXIX.

One having reſigned a Dignity or Imployment, and returning thereafter thereto, whether does he who has ſo reſigned return to his former Precedency?

To this it is anſwered, That he does not; but having embraced again the employment he had formerly reſigned, he is onely to have Precedency according to his laſt Reinſtalment, *Langleus* 7. *Semeſt.* 8. where it is laid down as a rule that Precedency once loſt is never recovered, and an inſtance of this is given *cap. ex Inſinuatione* 26. in a *Chanon*: who having once renunced his Benefice, and having thereafter embraced it, is onely to be preferred according to the date of his laſt title.

From this laſt rule, *viz.* that a Precedency once loſt cannot be recovered, *Gothofred. de Preced. cap.* 6. *num.* 43. obſerves theſe Exceptions,

Firſt, If the perſon who renounced his Dignity was preferred to a Higher or more Noble, in which caſe if he return to his firſt Imployment, he looſes not the Precedency due to it, for a greater Dignity never prejudges the leſſer, *L.* 3. *C. de Dignitatibus Rupanus, lib.* 7. *cap.* 27. and contains in it the leſſer, *per eminentiam*, as Lawyers ſpeak, *ſuperveniens major Dignitas auget non minuit ſtatum*, except the two Offices be incompatible in themſelves, for then the leſſer is extinguiſht by the greater, *L. ſi debitoris ff. de fidejuſſor.*

The ſecond exception is, If the perſon in whoſe favours the Reſignation was made, will not accept, and upon his refuſal the Reſigner does pre-

ently return to his Precedency, *L. ſi forte ff. de Offic. Preſid.* And the reaſon is, becauſe the Reſignation being there made in favours of another has that tacit Condition in it, that if the other in whoſe favours it was made accept not, the Reſignation ſhall be null, and this is the nature of all Reſignations *in favorem* with us as to all Fews, as *Craig* well obſerves.

The third Exception is, If he who made the Reſignation do preſently repent, for in that caſe likewiſe he is in the condition, as if he Reſigned not; And thus the Law takes not advantage of Our ſudden and undigeſted thoughts, *Et uxor quæ mox rediit divertiſſe non videtur.*

The fourth Exception given by him is, If he who Reſigned reſerved to himſelf his former Precedency: for which though there be ſeveral *Roman* deciſions, yet it is very debateable, how far a man can by Proteſtation or Paction, diſtinguiſh and reſerve a Precedency, when he has Reſigned or Diſponed the Imployment to which it was annexed; For ſince the Precedency is onely due upon the account of the Imployment, it would ſeem that he who has Reſigned the Imployment, cannot retain the Precedency, and to do ſo, were to retain *accidens ſine ſubjecto:*

QUESTION XXX.

Whether may a Nobleman reſign his Honours in favours of a third Party? And if the Kings Confirmation thereupon will exclude the neareſt Agnats, who would elſe have ſucceeded by their right of Blood?

This queſtion ſeems of great Importance and intricacy: For it may ſeem that he may transfer his title in prejudice of his neareſt Heirs, becauſe the title is onely a Fee, and all Fews may be alienated; nor is this a meer right of Blood, but a priviledge beſtowed by the King, and conſequently may be transferred by his conſent: Nor can their be any thing more for the intereſt either of the Kingdom or of Noble Families, than that when the neareſt Heir is unfit to ſucceed, wanting either Means or Wit ſuitable to ſuch a Dignity, it ſhould be in the power of the King, and the Noble perſon himſelf to chooſe a fit ſucceſſor. Likeas this was ſo decided in the caſe of *Robert* King of *Sicily*, *Cl. paſtoral. de re Jud.* And many Lawyers have been of opinion, that even elder Brothers might reſign their right of Succeſſion and *primo-genitur* in favours of the third Brother, paſſing by the ſecond, *vid. c.* 1. § *præterea tit. quib. mod. feud. amit. & Bald. Conſil.* 389.

But others conlude, That the neareſt by Blood are not prejudged by ſuch Reſignations: Becauſe this is a right flowing from the favour of Nature and Law, *Naturæ & Legis donum quod non poteſt auferri, L. ſi arrogater, ff.* § *ſed an ff. de Adopt.* nor is Dignity expoſable to ſale or in Commerce, *L. Julianus ff. ſi quis omiſſ.* Whereas if ſuch Reſignations or tranſmiſſions were ſuſtainable, all titles might be ſold, and the meaneſt Fellow if Rich, might by the favour of a Miniſter, and the folly of the preſent Poſſeſſor, exclude the Nobleſt Race: And by the Feudal Law, though a Vaſſal may denude himſelf, yet he cannot tranſmit his Fee in favours of remoter Heirs to the prejudice of the nearer, *cap. Titius tit. ſi de feud. fuer. Contraverſ.* this caſe is not decided with us; but the King upon a Reſig-

Reſignation from the late Earl of *Caithnes* in favours of *Glamrchy*, confirmed the title in his favours, but by a new Patent, and without the former Precedency, and diſcharged by a letter the next Heir to uſe the title, till the matter ſhould be decided by the Judge competent. But I find that in *England Ed.* 2. granted to *Edmond de Lincourt* upon his Petition a Patent under the great Seal, impowering him to aſſign his Sirname, Arms, and Barony: But the Lord *Hoe* having aſſigned his Name, Arms, and Dignity without the Kings licence, the deed was adjudged void in Parliament; From which the Authour of *Jus imaginis*, *pag.* 27. concludes firſt, That the title of Nobility may be aſſigned: Secondly, That it cannot be aſſigned without the Kings licence: And yet I find that in the Viſcount *Purbecks* caſe, it was lately found by the parliament of *England*, that a Nobleman could not levey a fine upon his Honour in prejudice of his Heir, that is to ſay, That a Nobleman could not do any deed to the prejudice of his Honour, by alienating or ſurrendring the ſame to the prejudice of his Heir, though I am informed that there were very many inſtances adduced for clearing the contrare opinion.

QUESTION XXXI.

Whether does the former right of Precedency remain with him who has reſigned the Office by which he enjoyed the Precedency?

It ſeems that the Honour being in that caſe due upon the account of the Office, ſhould ceaſe with its cauſe: But yet ſuch reſpect is given by the Law to thoſe who have once enjoyed an Office, and uſed it well, that the former Dignity and Precedency is allowed them after they have reſigned the Office, *L. eam Legem ff. de excuſat. Illi in quos munera noſtra redundarunt, beneficiis eorum non ſolum quamdiu militaverunt, ſed etiam quamdiu vixerint, perfruentur*, and *Guid. Pap.* relates *deciſ.* 377. that it was ſo decided: For the being eſteemed worthy to poſſeſs ſuch an Office is a quality inherent to, and inſeparable from the perſon ſo advanced, and in moſt caſes even Deprivation does not extinguiſh the Precedency, becauſe the order ſtill remains, as if a Biſhop be depoſed he is ſtill a Biſhop, and therefore has Precedency as ſuch; But in ſuch caſes as the deprivation deſtroys the order it ſelf, it deſtroys alſo in that caſe the Precedency, as if a Knight were degraded for Cowardlineſs, he is no more a Knight, and ſo looſes the Precedency annext to the Order, *L.* 12. *de Dignit. ſi Judices ſe furtis & ſceleribus fuerint comaculaſſe convicti, ablatis codocillorum inſignibus & honore exuti inter plebeios habeantur.*

QUESTION XXXII.

If a perſon do not of himſelf reſign, but be called from his Charge by the Prince to another Imployment, and one provided to his place, and returning thereafter to his firſt Dignity by the Princes command, whether does he get Precedency according to his firſt or laſt inſtalment?

I find this to have been agitated in the Parliament of *Savoy*, *anno* 1590. in the caſe of the Biſhop of *Alby*, who being called from being a Counſellour in that Parliament to a Biſhoprick, and his place being filled by another, he thereafter was called back to be a Counſellour: And this may fall out with us in many caſes, as for inſtance, If one ſhould be called from being a Lord of the Seſſion to be Juſtice General, and ſhould thereafter be returned to be a Lord of the Seſſion: And I find it was decided in *Savoy*, that the perſon ſo recalled ought to preceed according to his firſt inſtalment; but the reaſon there was that the Prince had expreſly declared at his Demiſſion, that if he returned he ſhould return to his firſt Precedency, and that it were indecent that he who was firſt formerly in that Judicature, ſhould thereafter ſit in the loweſt place, meerly becauſe he was once called away to a higher preferment: And in my opinion, If the Prince had not ſo expreſly declared at the firſt Demiſſion, the caſe might have been harder, but that Declaration made that thoſe who were thereafter preferred, could not think themſelves prejudged by this new readmiſſion, ſince their inſtalment was ſtill burdened with this tacit quality. I likewiſe think, that if he had returned before any others had been advanced, the difficulty had been much leſs, ſince there no third party was prejudged of a right acquired *medio tempore*; albeit it might be alleaged that by his Tranſlation, the other Judges formerly below him ſucceeded to his right of Precedency; For againſt this I conceive the former proteſtation could have eaſily guarded, albeit that proteſtation does ſeem *contraria facto*, and the quality adjected to be inconſiſtent with the nature of the thing, where the place was filled by another, ſince regularly two cannot preſerve the ſame Rank or Degree, *Arg. L. cum in Teſtamento ff. de hæred. inſtituend.* It may be likewiſe argued, that though this quality and proteſtation was admiſſable, where the party ſo called away was called to a higher Dignity of the ſame rank, that there the leſſer was poſſeſt by poſſeſſing the greater, as if a Juſtice General ſhould be called back to be a Lord; Yet this would not hold, notwithſtanding of the former proteſtation and quality, where he is called away to a leſſer imployment, or where he is called to an imployment of a different and incompatible Nature, as from being a Judge to be a Collonel: And yet all theſe queſtions ſeem of leſs difficulty with Us, where the Prince may certainly admit a Judge to be the firſt or laſt: And therefore amongſt Us theſe queſtions would onely take place, where the perſon formerly inſtalled was called away or preferred without any ſuch Declaration by the King in his favours.

QUESTION XXXIII.

Whether does he who is ſuſpended from the Exerciſe of an Office, return to the ſame Precedency *when the Suſpenſion is taken off?*

To this it is anſwered, He does: For though a Suſpenſion may ſeem a Degradation and a Privation of the former Honour, and all Privations extinguiſh, *nec datur regreſſus a privatione ad habitum*, yet, Suſpenſion is in

in Law declared to be onely a temporal Interdiction from the Exerciſe, but not an extinction or Privation of the right: And this is clearly determined, *L.* 2. § *ff. de Decurion.* and by *Langlæus* 7. *Semeſt.* 8.

QUESTION XXXIV.

Two having Offices, and changing one with another their Imployments for a time, whether when they Reſume their former Imployments, do they return to their former Precedency?

It is anſwered, Where two did exchange Imployments, and thereafter returned to their old Imployments, Lawyers are of opinion, that in that caſe they return to their former Precedency, and that their imployments are not looked upon as new imployments, becauſe the one poſſeſt ſtill by the other, and ſo the poſſeſſion was ſtill the ſame; as if it had been by themſelves, *L'oiſeau lib.* 1. *cap.* 7. *Rupan. lib.* 7. *cap.* 27. but though this may hold where both of them changed but for a time, ſince there indeed the one poſſeſt by the other; yet this ſeems harder, in the caſe where both of them exchanged abſolutely andfor ever: For there, their former right ſeems to have been extinguiſhed, and the Imployments to be new as to both.

QUESTION XXXV.

Whether is he who is reſtored by the Prince to a Dignity, from which he was Degraded, to be reſtored to the ſame Precedency which he had formerly?

To which it is anſwered by *Gothofred. cap.* 6. *Theſ.* 45. That he is not by this Reſtitution to recover his former Precedency from which he was Degraded, but he muſt preceed by vertue of his new title onely: But I ſhould rather diſtinguiſh betwixt theſe who are reſtored by way of Juſtice, in which caſe the Precedency ought to be the ſame, becauſe the Reſtitution be way of Juſtice takes away the Impediment and Degradation, as if it had never been; but where the Reſtitution is onely by way of Grace, there the Fault and Sentence ſtill remains, though the puniſhment be taken off; and there the Reſtitution ought not to reſtore the Precedency, in prejudice of thoſe who had acquired titles betwixt the Forfeitour and Reſtitution: A clear inſtance whereof we have in the Earl of *Crawfurd*, who being Forfeit for Rebelling againſt K. *James* the 2. at the Battel of *Brichen*, and being thereafter reſtored, he was not reſtored ſo as to take place from the Earl of *Huntly*? But yet it is obſervable, that the 4. *Act. p.* 16. *p.* 87. *J.* 6. which appoints reſtitutions *per modum gratiæ*, not to prejudge third paties; ſpeaks onely of lands, poſſeſſions, and ſuch other parts of the Eſtate forfeited, but ſpeaks not of Honours; and therefore ſome conclude that perſons forfeited may be reſtored to the Honours of their Family, notwithſtanding the Precedency by the reſt of the Nobility in the *interim*, which is the rather received amongſt us, that the King may with us creat an Earl with the Precedency from all others, as he could have done in *England* before

the ſtatute of *Hen.* 8. For I find by the Herauld records, that *Edmond* of *Hadham* is created Earl of *Richmond*, *& quod habeat ſedem in Parliamentis & alibi proximum ducibus*: And *Henry Beauchamp* Earl of *Warwick*, is made *primus Comes Angliæ*, whereas he was formerly almoſt laſt, and thereafter is created Duke of *Warwick*, with this addition; That he ſhall go Mate-like with the Duke of *Northfolk*, and above the Duke of *Buckingham*. And ſince our Kings had this prerogative, and that they have not reſtricted themſelves, they might have it ſtill, though they ſhould uſe it ſparingly.

QUESTION XXXVI.

Whether have the Ambaſſadours of Monarchs the Precedency from other Monarchs or Princes themſelves, if perſonally preſent, even as the Kings would do whom they repreſent? And if in all caſes an Ambaſſadour ought to have the ſame Precedency that is due to his Conſtituent?

To this it is anſwered, That though an Ambaſſadour repreſents the Monarch from whom he derives his Commiſſion, and that ſome learned Lawyers do upon that account aſſert, that they are to have the ſame Precedency that is due to their Maſter, and ſo to be preferred to all Kings and Princes though preſent, to whom their Conſtituents would have been preferred, *Paſchal. de Legat. cap.* 38. yet the cuſtom of Nations has run contrar to his opinion, in preferring even inferiour Kings and Princes: And it is decided amongſt the Princes of *Germany*, *Tit.* 25. *Aureæ Bullæ*, *Car.* 4. And in *anno* 1542. the Ambaſſadours of *Charles* the fifth Emperour, were decerned to cede the Precedency to *Ferdinand* King of the *Romans*, and the reaſons are, 1°. Becauſe Princes found it their Intereſt to have no Subject compete with them, or to have their own preſence leſſened by ſuch marks of Diſreſpect. 2°. In a Prince who is preſent there reſides True and Original Majeſty; whereas an Ambaſſadour is onely dignified with a Suppoſititious and Repreſentative Honour, ſhining (if I may ſo ſay) with borrowed rayes: And of this opinion are *Brunus de Legat. lib.* 5. *cap.* 8. and *Coſta Conſil.* 44. though *Zouch. de Jure inter Gentes* ſeems to favour *Paſchals* opinion.

It may be likewiſe doubted, whether an Ambaſſadour does retain the ſame Precedency due to him as Ambaſſadour, when the Prince who ſent him comes to the place himſelf: And this was debated by the Earl *Mariſhal* who was ſent over Ambaſſador to *Denmark*, when K. *Ja.* 6. went over in perſon thereafter, and brought over Chancellour *Maitland* with him, who challenged the Precedency from the Earl *Mariſhal*, alleaging that an Ambaſſadours Power evaniſhes upon his Princes appearance: Which debate was decided by King *James* in favours of the Chancellour, albeit the Earl contended, That as his Ambaſſie ceaſed upon the Kings coming thither, ſo did the others Office as Chancellour ceaſe in a forreign Kingdom, and therefore that he ſhould have preceeded as being an Earl.

The former opinion preferring inferiour Princes when Perſonally preſent, [illegible], is ſo much the rather true, that Ambaſſadours are not, when they come to viſit the Judicatures of the Nations where they

preceed

preceed allowed the ſame Precedency; And generally it is given as a rule by Lawyers, that *in locis & actibus Judicialibus Legatis præcedentia ſolita non ſervatur, & non pro dignitate Regis aut alterius a quo ablegati ſunt, Gothofred. de Jure præcedentiæ, cap. 7. num. 47.* ſo that though Kings themſelves would ſit above all theſe Judicatures, yet their Ambaſſadours ſit but among them; Thus the *Venetian* Ambaſſadour was onely placed in the Parliament of *Paris* after the Biſhops, as *Rupan.* obſerves, *lib. 7. cap. 10.*

Though Ambaſſadours have the ſame Precedency that is due to their Conſtituents, yet Agents and Reſidents of Princes have not, nor has the Popes Nuncio the Precedency that is due to an Ambaſſadour, *Gothofred. ibid.* for theſe in effect are ſent oftentimes to prevent the Debates that might fall amongſt Ambaſſadours, and therefore the *French* King ſends very rarely his Ambaſſadours to the Emperours Court, becauſe he knows that Court would give the *Spaniſh* Ambaſſadours the Precedency, which he thinks is due to his Ambaſſadours.

QUESTION XXXVII.

Whether have ſuch as have been Ambaſſadours, or have been in ſuch honourable Imployments, any Precedency thereby when their Imployment is ended?

To which it is anſwered; That though after an honourable Imployment is over, whether by Dimiſſion, or by the expyring of the Commiſſion, the Precedency thereto annex'd ceaſes with it; Yet the Prince ſometimes gratifies the perſon with a continuance of ſome Precedency and Honour: And in the Records of the *Herauld* Office in *England*, I find that in a Court *Mariſhal*, Sir *Dudley Diggs*, and Sir *Thomas Smith*, were adjudged to have the Precedency from other Knights-Batchelours of their own Degree, becauſe they had been Ambaſſadours, though their Commiſſion was expired. In the cuſtoms alſo of moſt Nations, a Judge retains ſtill amongſt thoſe of his own Bench the ſame Precedency that he had formerly before his Dimiſſion, or his being laid aſide, except he has been laid aſide for a Crime or Fault.

QUESTION XXXVIII.

What place is due to the Repreſentatives of Subjects, ſuch as Viccars, Deputs, Aſſiſtants, &c?

It would ſeem that as Ambaſſadours have the ſame place that is due to him whom they repreſent, ſo thoſe who repreſent Subjects, as Viccars who repreſent the Biſhop, Deputs who repreſent Judges, ought to have the ſame place that is due to thoſe whom they repreſent: I find that *L. 7. de Honorcodicil. C. Theod.* there are four Dignities Ranked, *viz. Præfectorum, Proconſulum, Vicariorum, & Exconſularium.* And certainly in thoſe Acts, wherein they repreſent their Conſtituent, they have the ſame Precedency that is due to him, *Felin. in cap. cum olim de Offic. & Legat.* And thus by the Canon Law, the Biſhops Viccar is preferred to the Dean,

and Arch-dean, and not onely are theſe repreſentative Dignities preferred in the acts of their Juriſdiction, but even in all other deeds, which neceſſarily preceed or follow them; And ſome Lawyers are of Opinion, that they are to be preferred to the ſame Dignity, in all promiſcuous and indifferent Acts which fall in during the time of the Repreſentation, and thus *Cantuccius deciſ.* 582. is of Opinion, that the Biſhops Viccar ſent by him to hold a Synod, is to have Precedency before all the Chapter, not onely in the Synod it ſelf, but likwiſe in all other Aſſemblies, Viſits, and Intertainments, during his Commiſſion: But the contrare of this is mantained by *Menoch*, *Conſil.* 51. And in my Opinion, theſe Doctors may be thus reconciled, *viz.* If the Repreſentation flow immediately from the Law, as for inſtance, If the Council ſhould Delegat any man to be Sheriff, there the perſon ſubſtitut would have in all caſes during his Commiſſion, the ſame place that is due to him in whoſe place he was ſurrogat, for there *Surrogatum ſapit naturam ſurrogati*; But if the Repreſentation flow from the perſon himſelf whom he Repreſents, in that caſe the Repreſentative has onely the Precedency, whilſt he is exerciſing the Office, or in Actions thereto relating; And thus Sheriff-deputs with us have onely the Precedency due to their Conſtituents, whileſt they are exerciſing theſe Acts which relate to their Office: And yet I think, that thoſe Repreſentatives of Subjects have even in all extrinſick and indifferent Acts the Precedency due to their Conſtituents, when they meet with others of the ſame Degree, and thus amongſt Sheriff-Deputes, *&c.* the Precedency is to be given according to the Precedency that is due to the Principal Sheriffs.

QUESTION XXXIX.

What Precedency is due to Aſſeſſors appointed for Judges, and to extraordinary Judges?

I conceive that Aſſeſſors choſen by a Judge get no Precedency thereby, ſince Subjects cannot beſtow Dignities; but that where the Prince names any man Aſſeſſor to a Judicature, the perſon ſo named has thereby the Precedency next to the Judge to whom he is named Aſſeſſor, *nam eſt ejus umbra*, his ſhadow as the Law ſpeaks, and the ſhadow ſhould follow the body: And with Us when the Council names Aſſeſſors to the Juſtices, the Aſſeſſors vote onely after the Juſtices; And yet in *France* I find that Aſſeſſors take place after the Preſident, and before the other Councellours, and ſo it was decided at *Paris*, 1608.

It may be alſo doubted, whether Our extraordinar Lords of Seſſion who ſit with and vote after the ordinar Judges, ſhould have place after them if they were not Earles or Noblemen, as by the inſtitution they are oblieged to be (but not either as that the King may not promote Gentlemen hereafter) *quo caſu*, I think they would take place after the ordinar, as they vote after them: For theſe extraordinar Lords are like to theſe *adſcriptitii* or *allecti*, *l.* 2. *C. ut dignit. ord. ſeruetur.* of whom *Capitolinus* in the life of *Pertinax*, *quum Commodus allectionibus innumeris prætorios miſcuiſſet*, *ſenatuſconſultum Pertinax fecit juſſitque eos qui præturas non geſſiſſent ſed allectione accepiſſent poſt eos eſſe qui vere prætores fuiſſent.*

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QUESTION XL.

Whether can the King Creat now an new Earl, and Ordain him to preceed all the former Earles, or any ſuch number of them as he pleaſes?

It would ſeem that the King cannot: For there being a Precedency acquired to the former Earles by their firſt Gift, the King cannot by any new gift prejudge third Parties, and this were in effect to Forfeit them of their Precedency; Likeas it would ſeem, that ſince moſt Earldoms were granted by erecting lands in an Earldom iſh favours of the Receiver, that therefore the Conceſſions of Land and Honours are of the ſame Nature, and that no new grant can prejudge the one more then the other.

But it may be urged on the Kings part, that the King being the onely fountain of Honour, he may do therein as he pleaſes, except in ſo far as he is limited by Law; And therefore ſince there is no Law with us limiting the King in this point, he may do therein as he pleaſes. 2°. The King by Act of Parliament, *Henry* the eight, is limited as to this point in *England*, ſo that he can grant no ſuch Preference; And therefore it may be concluded that this was formerly in his power even there, and that ſince he is not limited here, his power is here intire as to this point, whereof many inſtances are given in anſwer to *queſt.* 35. and ſince that ſtatute, it is thought that His *Majeſty* may ordain the laſt Knight to preceed all the reſt formerly dubb'd and created, becauſe Knights are not expreſt in that ſtatute. 3°. We ſee the King in *Scotland* does impower Counteſſes to retain their former Precedency, though they marry a Huſband of a Rank inferiour to their firſt Huſband; And Dukes Daughters even after their Marriage to retain the Precedency due to them as Dukes Daughters. 4°. His *Majeſty* does by new Confirmations transfer the Honours to Hiers Female, though the Patents at firſt were onely granted to Hiers male, and ſo by the not exiſting of the Hiers Male, thoſe Earles who have the next Precedency might aſwell alleadge, That the King could not by any new right in favours of the Hiers Female prejudge them. 5°. His *Majeſty* does ſometimes appoint any of His Officers of State to preceed other as he pleaſes, though theſe may likewiſe alleadge, that there is *jus quæſitum* to them by their prior Gifts: 6°. His *Majeſty* reſtores the Sons of perſons forfeited to their Fathers Precedency, notwithſtanding of the *jus quæſitum*, by others *medio tempore*. 7°. The King has oblieged himſelf not to prefer the Knights of *Nova Scotia*, or Knights-Baronets, otherwiſe then according to their Creation, which had been unneceſſar, if the King could not have preferred them by His Royal prerogative: Sometimes alſo His *Majeſty* confirms to the Nobility the entails of their Eſtates, whereby they have power to name their Succeſſour with the Precedency due to themſelves, which right being ordinarly ratified in Parliament, uſes to eſtabliſh and transfer the Precedency upon the Heir or Succeſſour ſo nominated; But ſince Ratifications paſs without obſervation, and oftentimes without reading, it may be doubted whether ſuch a Ratification ſhould prejudge even theſe who were Members of Parliament, but much more ſuch as were not preſent, or ſuch as were Created thereafter, theſe Ratificatious not being properly publick and Legiſtative ſtatutes, and ſo can bind onely ſuch as conſented.

QUESTION XLI.

Whether if the King ſhould creat an Earl with Precedency to all other Earles, during his life? Or if when an Earl is Forfeited, will his Lady in either of theſe caſes retain the Precedency ſhe formerly enjoyed during her Husbands life?

To which it is anſwered, That as to the firſt it was expreſly decided in *England*, in the caſe of the Earl of *Notingham*, that he upon the ſurrender of the Admirals Office, being by King *James* allowed the ſame Precedency that belonged to *John* Lord *Moubray* his predeceſſour, That therefore his Lady ſhould enjoy the ſame Precedency if ſhe ſurvived him, becauſe this was not a Dignity of Office, but a real Dignity ſettled in his perſon; and generally in all real Dignities ſuch as thoſe of *Dukes*, *Marqueſſes*, *Earles*, &c. the wives participat the Husbands honour even after his death, for it is not the Patent that confers the Honour upon her, for elſe ſhe could not enjoy the ſame except ſhe were therein mentioned, but her right flows from the Common-Law which illuſtrates the Wife with the Husbands Dignity, becauſe Marriage is *individua vitæ conſuetudo*; And in the Law, the Husband and Wife are one perſon, and for the ſame reaſon we ſee likewiſe that the Wives of Knight-Batchelours, and Knights of the Bath, enjoy the ſame Precedency that was due to their Husbands, though they enjoyed the ſame for Life: And whereas it may be objected that the Husband having the Honour but for Life, it cannot be continued longer then for the time limited, or to be tranſferred to the Wife after the death of her Husband. It is anſwered by the ſame rule and proportion no wife whatſoever ſhould enjoy the title of her Husbands honour after his deceas, but then all the honour and place ſhould ſurceas, for ſhe challenges nothing but from her Husband: The Honour for perpetuity to the Heirs, concerns onely the Deſcendents and they are thereby Enobled; But to her a ſtate for Life, and a ſtate to the Heirs is all one. I find alſo that Sir *William Haram* having married the daughter and Heir of the Lord *Saye*, and ſo being in her right a Baron, and by reaſon of that Marriage ſummoned to the Parliament as a Peer of the Realm, having ſurvived his wife, albeit he had no Iſſue by her, he notwithſtanding enjoyed that title and dignity during his life.

To the ſecond branch of this queſtion it is anſwered, That the wife of a perſon forfeited enjoyes the ſame title and dignity that was due to her before the forfeiture; for though it may ſeem that the dignity of the Family is extinguiſhed, and conſequently ſhe cannot enjoy it; Yet the crime puniſhes onely the perſon, and corrupts onely the blood *quo-ad* the Deſcendents, but not *quo-ad* the Wife: And though the honour be extinguiſhed, yet being extinguiſhed upon a perſonal account, the puniſhment ought not to reach further then the crime.

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QUESTION XLII.

Whether amongſt thoſe of the Royal Line, does the next to the Royal Stock preceed? Or does the Precedency belong to the eldeſt of that Branch?

The reaſon of this doubt is, Becauſe as in other Nobility the firſt who is dignified has ſtill the Precedency, as being fartheſt removed from the Dreggs and Lees of the Vulgar; So amongſt thoſe who are deſcended of Kings, the laſt is ſtill preferred as being nearer to the Common-Stock, by which all are Enobled: And therefore the Uncle, it ſeems, ſhould preceed his Nephew by the elder Brother, as being a Degree nearer to the Stock, as was alleaged by the Cardinal of *Bourbon* Uncle to *Henry* the fourth; But yet it was juſtly decided for *Henry* the fourth, becauſe though the younger Branch be ſtill preferred, yet amongſt theſe of the ſame Branch the eldeſt is ſtill preferable, for by the right of Repreſentation he Repreſented his Father, which Father would have been preferred, and here again the right of Birth-right ſtill returns: And this holds not only in *France*, as *Tillet* obſerves, but with us in *Britain*, and generally in all Law, *Exod.* 6. and 1. *Cron.* 4. *vid.* Dec. *Conſil.* 445. albeit of old in *Scotland* the Uncles did oftentimes uſurp upon this account, *L'oiſeau chap:* 7. And to this day the eldeſt Cadets in private Families do ſtill take place with us, from the laſt deſcended beyond the Brothers of the Family, and thoſe old Cadets take place of the Nephews, which is an Errour.

QUESTION XLIII.

Whether and when is the right or left Hand the chief mark of Precedency? And whether is the place oppoſite to the ſeat of the chief Perſon who ſits betwixt the two preferable to either right or left Hand?

To this it is anſwered, That amongſt both the *Jews*, *Greeks*, and *Romans*, where three were either ſitting or walking, the midle-place was thought the chief place; but where two were without a third, the right Hand was concluded the more Noble amongſt the *Jews:* and thus the Scripture tells us, *That ſuch as are to be ſaved ſhal ſit at the right hand of GOD*; And yet in *Jacobs* Bleſſing *Ephraim* and *Manaſſeh*, the left hand was preferred, *Geneſ.* 48. *vid. Panſirol. lib.* 1. *pag.* 501. But amongſt the *Romans* it was doubted which of the two was preferable, *Demſterus Antiq; Roman. pag.* 866. And yet it is certain that amongſt the *Turks* the left ſide is acounted the more Noble, becauſe he commands his neighbours Sword; And though theſe be the chief Seats, yet he who is ſet oppoſite to him who ſits in the midle, is thereby preferred to him who either ſits upon the right or left hand, ſince in effect he is made the Correſpondent of the chief Perſon, as *Golſtadus* defends by many inſtances, *pag.* 433.

QUESTION XLIV.

Whether in Improbations raiſed to ſecure Precedency, can Certifications be granted, aſwell, againſt Patents of Honour as againſt other Writes?

This queſtion having occurred in a Debate *January* 1672. betwixt the Earl of *Sutherland* and the Earl of *Errol*, It was urged that in Declaratours of Precedency, and Improbations raiſed for ſecuring thereof, no Certification could be granted, becauſe 1°. ſuch Certifications were onely granted where the Right and Title to be improven was conſtitute by Write; But to it is, that the Dignity and Honour of *Dukes*, *Marqueſſes*, *Earles*, &c. was not onely eſtabliſhed by Patents, or Infeftments, but might be acquired by bringing them in to Parliament in their Robes, and ſuch other formes of Creation, as have been practiſed both amongſt us and other Nations, againſt which no Certification could operat. 2°. Certifications are onely allowed where the Purſuer of the Improbation has a direct title to that whereof the Right is to be improven, excluſive of all others: But ſo it is that the Earl of *Sutherland*, nor no other has an expreſs, and explicite Right to be the firſt Earl of *Scotland*, and any right he has to the Precedency; ariſes onely conſequentially. 3°. Improbations being onely a remedy introduced by our Law and the native deſigne thereof being to ſecure real rights, and private Eſtates: it ought to be extended to no ſuch caſe, as that of Dignities and Honours, to which it has never heen applyed, during theſe many years that Improbations have been uſed here, and to which certainly our Predeceſſours would have applyed them, if the nature of the action would have allowed it.

To which it was anſwered, That Certifications being introduced amongſt us, to ſecure the Purſuer againſt any Evidents in the Defenders hand, which might prejudge the Purſuers right, they ought to be extended to Honours eſtabliſhed by Patent, or Infeftment, theſe being rights that are tranſmitted by Write, and this being the nature of thoſe Certifications, they ought to take place every where except where expreſs Law or Deciſions have reſtricted them. And therefore, ſince there is no Law nor Deciſion, Declaring that Certificationss ſhall not be granted againſt Patens, or Infeftments which tranſmit Honour: they ought to be granted againſt theſe, aſwell as againſt other rights. Nor is it craved, that theſe Certifications ſhould run againſt Honours tranſmitted *via facti*, ſuch as *Robing*, and *Belting*, and though the Purſuer be not deſigned by his Infeftments the firſt Earl, yet that cannot hinder him from removing by this Certification, all Writes, or Evidents, which may hinder him to be the firſt, Upon which Debate, the Lords refuſed to grant Certification againſt ſuch Patents, or Infeftments.

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Courſes taken by Princes and Judges, when they intend to ſhun the decyding of Contraverſies concerning Precedency, and to preſerve the Rights of all the Competitors.

Firſt, They ordain the Competitors to preceed one another by turns, and alternatively: And thus the Emperour *Lewis* the fourth did in *anno* 1328. decide betwixt the Prince P*alatine*, and the Duke of *Bavaria*, and ſo the Parliament of P*aris* decided in *anno* 1616; but leſt the firſt turn ſhould give the Precedency that uſes to be decided by lot. And I find this alternation very old, for the *Thebans* did ſo decide betwixt the Brother-Kings, *Etheocles* and P*olinix*; and P*lutarch* obſerves the ſame betwixt *Thyeſtes* and *Attreus*.

Secondly, They uſe to aſſigne one of the Competitors a place out of all Rank; as was done to the *Spaniſh* Ambaſſadour in the Council of *Trent*, and is frequently done in Our Parliaments; But though this preſerves the Right, it inſinuates a Ceding: And therefore the juſter way is to place both ſo without the Benches, as that neither of their ſeats can ſhew any Preference, as was done at the Council of *Trent* betwixt the Emperours Ambaſſadour and the Cardinal of *Trent*.

Thirdly, They uſe to cauſe them enter by ſeveral doors, as was obſerved betwixt the Queen of *France*, and *Margaret* ſiſter to *Charles* the fifth, as *Guicciardin* obſerves.

Fourthly, They uſe round tables, or to write the names of the Pretenders in a circle, an example whereof we have in *Gaius*, *lib.* 1. *Inſtitut.* and Pope *Urbane* having deſired the *Franciſcans* to give him three of their number out of which he might chuſe one to be Cardinal, they wrote down their three names circular-ways; but in this caſe, the names ſhould be written down exactly in the midle of the table or paper; for elſe as *Crantzius* obſerves, he whoſe name is next to the top of the paper has thereby ſome Precedency.

Fifthly, The eldeſt of the Competitors is ſtill ordained to preceed: Of which *Livius* gives an inſtance, *lib.* 42. and King *James* the ſixth decided ſo between ſeveral Families in *Scotland*, and particularly between the Lairds of *Blair* and *Balthaok*.

Sixthly, Sometimes he who was firſt promoted to a Benefice or Office is preferred, where the difference is betwixt the Offices or Benefices; and thus it was decided betwixt the Sees of *Rheims* and *Treves*.

Sevently, Sometimes alſo the Competitors are preferred according as they produce their Commiſſions, as was done in the Council of *Trent* betwixt the Ambaſſadours of *Portugal* and *Hungary*; and the P*olonians* do frequently in Competitions between Ambaſſadours, prefer him who firſt enters their Territories, *Bodin. de Repub. lib.* 1. *cap.* 9.

Eightly, Sometimes alſo the Competitors are ordained to give their ſuffrage and preceed according to the reſpect due to the Nations, and not to the perſons: as was decided in the Council of *Conſtans* and *Baſil*.

Ninthly, It is obſerved that *Octavius Farneſius* Prince of P*arma* and P*lacentia*, to ſhun the difference of Precedency betwixt his two Towns of P*arma* and P*lacentia*, did write himſelf Duke of P. P. And King *James*

the ſixth to ſhun any debate that could have been between *Scotland* and *England*, aſſumed the title of *King of Great Britain.*

Tenthly, Some uſe to ſecure themſelves againſt ſuch conteſts by Proteſtations, which certainly do interrupt preſcription, and preſerve the Proteſters right, *L.* 14. § 8. *ff. de Relig.* but in that caſe the proteſtation muſt be preſently interpoſed, for proteſtations after the deeds contraverted are ended and paſt, are concluded to be of no value, *Carpzol. def.* 22. for proteſtations cannot be drawn back: But it has been doubted whether the perſon againſt whom the proteſtation is taken, does prejudge himſelf, when he does not proteſt in the contrar, for this ſeems to infer an acquieſcence that the proteſtation is juſt, ſince *qui tacet conſentire videtur*, and this is the occaſion, why in our Judicatures when one proteſts, the other ordinarly proteſts in the contrare; But yet it is generally concluded that Silence in that caſe does not prejudge him againſt whom the proteſtation is taken, ſince he knows that in Law the proteſtation ſecures his right, *Tuſc. tom. 6. Concluſ.* 941.

FINIS.

GEORGIVS
A VALLE ROSARVM
FIRMA VEL ARMA
P. Vandrebanc - sculpsit -

OBSERVATIONS

Upon the

LAWS and CUSTOMS

OF

NATIONS,

AS TO

PRECEDENCY.

BY

Sir *GEORGE MACKENZIE* of *Roſehaugh*,

His Majeſty's Advocat in the Kingdom of *SCOTLAND.*

PETRON.

——*Hos gloria tulit Honores.*

EDINBURGH,

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ſiderable eſtate, becauſe that Act was to proportion the Surety to be found to the eſtate of him who finds the Surety.

The old Barons (or Lairds) amongſt us eſpecially where they are Chiefs of Clans, or the Repreſentatives of old Families that were Earldoms, as *Pitcurr* is of the Earl of *Dirleton*, and as Chief of the name of *Halyburton*, have never ceded the Precedency to Knights-Baronets, much leſs to ordinar Knights. Though the other pretend that a Baron is no name of Dignity, and that Knights-Baronets have a ſpecial priviledge, that there ſhall be no degree betwixt them and Lords, except the Bannerets; And though *militia non eſt per ſe dignitas, Chaſſan. fol.* 344. yet generally it is believed, that next to Knights-Baronets ſucceed Knights-Batchelours, and next to them our Lairds, or Landed-Gentlemen, though a Laird in effect is but the corrupt word of a Lord.

Amongſt ſuch as profeſs Sciences, the Ranking goes thus uncontravertedly, 1°. Such as profeſs *Theology*. 2°. Such as profeſs the *Canon-Law*. 3°. The *Civil-Law*. 4°. *Philoſophy*. 5°. *Medicin*. 6°. *Rhethorick*. 7°. *Poeſy*. 8°. *Hiſtory*. 9°. *Grammer*. 10°. *Logick*. 11°. *Arithmetick*. 12°. *Geometry*. 13°. *Muſick*. 14°. *Aſtronomy*; *Chaſſan. de gloria mundi pars decima*. And amongſt theſe, ſuch as are Doctors preceed theſe that are not, and amongſt Doctours, the priority goes by Age.

In Towns, Theſe who inhabit Cities are preferred to ſuch as inhabit Burghs, and generally thoſe in the Metropolitan, or capital City are preferred to all the reſt: And thoſe who have born Magiſtracy, are even when their Magiſtracy is over, preferred to all others. And ſo far is this Precedency obſerved, that 1° A younger Alderman or *Bailie* takes not Precedency from his Senior, becauſe he is Knighted, or as being the elder Knight, as was found in the caſe of the Alderman *Craven*, who though all the reſt of the Alderman were Knighted at the Coronation of King *James*, kept the precedency formerly due to him as Senior Alderman. But though this hold not onely amongſt Aldermen, but that even all Knights of the Countrey, being Burgeſſes of a Town, do cede to theſe who have been their Magiſtrates in it, as to publick meetings relating to the Town; Yet it is doubted whether ſuch a Knight will be oblieged to give place to an Alderman, or *Baily* in a neutral place. *But* it is determined in the Heraulds Office of *England*, that all ſuch as have been Mayors of *London*, that is to ſay, Provoſts with us, do take the place of all Knights-batchelours every where, becauſe they have been the Kings Lieutenants.

It is there likewiſe remarked, That Sir *John Crook* Serjeant at Law, was Knighted before any other Serjeant his Ancient, and ſtanding upon Precedency by reaſon of his Knighthood, It was adjudged againſt him by the Judges, *viz.* that he ſhould take place according to his Serjeancy, and not after his Knighthood, yet his wife took her place of a Lady before other Serjeants wives.

The Members of Courts do take place amongſt themſelves according to the precedency of the Courts, where they ſerve; as the Clerks of the Privy Council take place of the Clerks of the Seſſion.

In Families likewiſe, the Chief of the Family takes place of any Gentleman of the Family: And though generally it be believed, that Gentlemen have no precedency one from another, yet Reaſon and Diſcretion do allow that a Gentlman of three Generations, ſhould cede to a Gentleman of ten,

ten, if there be not a very great diſparity betwixt their Fortunes, and that for the ſame Reaſon almoſt, that a Gentleman of three Generations claims precedency from any ordinary Landed-man, who has newly acquired his lands.

CHAP. IX.

The Precedency due to Women.

WOmen before their Marriage have Precedency by their Father, but there is this difference betwixt them and the Male-children, that the ſame Precedency is due to all the Daughters that is due to the eldeſt, though it is not ſo amongſt Sons; and the reaſon of the difference ſeems to be, that Daughters would all ſucceed equally, whereas the eldeſt Son excludes all the reſt; But if this be the adequat and true reaſon, then where the Eſtate and Honours are provided to the eldeſt Daughter onely, excluding the reſt, they ought not to have the ſame Precedency that the eldeſt Siſter has. And therefore I aſcribe this difference rather to the cuſtome of Nations meerly founded upon the reſpect due to that Sex.

During the Marriage, the Wife regularly participats of the condition of her Huſband by the Civil Law, and Law of Nations, *L. 3. C. de Dignitat. Mulieres Honore maritorum erigimus, genere nobilitamus*, and ſince ſhe was to be ſharer in his misfortunes, the Law thought it juſt that ſhe ſhould be ſharer in his Advantages; And the Wife by the Canon Law is called *Socia divinæ & humanæ domus*, and *L. Fœminæ, ff. de Senat.* it is ſaid, that *Fœminis dignitatem clariſſimam mariti tribuunt*: But yet this rule has ſome exceptions, for though in *France* the wives of thoſe who have their Dignities by Offices, enjoy the ſame Precedency with their Huſband, together with a communication of his title, and thus they ſay there, *Madam la Chanceliere, Madam la Præſidente*: Yet it is not ſo with us, who think, that Offices are beſtowed on Huſbands upon a perſonal account, which is not communicable to their Wives; and yet in ſome Temporary Dignities, ſuch as that of a Knight-batchelour, the Wife participates of the Huſbands title and precedency: Though I find by the Heraulds Records, that this proceeded originally, rather from Courteſie than from Law, and that of old a Knights wife enjoyed onely his Honours during the Spouſals, nor were they to be called in Law *Dame Alice*, or *Dame Catherine, &c.* after the Marriage was diſſolved.

By our Law likewiſe, If a woman have Precedency by her Birth, or Deſcent, ſhe retains ſtill the ſame, notwithſtanding ſhe marry a perſon of inferiour dignity, contrare to the Rules of the ivil Law; And thus if the Heireſs of a Dutchie, or Earldom, marry a Gentleman, ſhe has ſtill the precedency due to a Duke, or Earl, albeit by the Civil Law, *L. 8. de Senat.*

it be expreſt that *Parentes donec Plebeiis nuptiis fuerint copulatæ, &c.* the reaſon whereof is as *Faber* obſerves upon that Law, becauſe it were moſt abſurd that the Wife ſhould have more dignitie then her Huſband; and thus *Livius* obſerves, that *Virginia* daughter to a *Patrician*, or noble *Roman*, was debarred from the Honours due to her Birth, becauſe ſhe had married a *Plebeian*; And it ſeems indeed that he being her Head, it is moſt unnatural that any part ſhould be more honourable then the Head: Nor can there be any thing more contrare to that ſuperiority, given both by the Law of *GOD* and Man to Huſbands, nor any means fitter to make a Wife deſpiſe her Huſband than this is. But I think this precedency has ariſen from the Feudal Law, for the wife having once a noble Fee, ſhe cannot forfeit the ſame by her Marriage, and therefore ſhe muſt retain the dignity that is annexed to it, which is incommunicable to her Huſband, becauſe he is not in Fie. But it is obſervable, that if the daughter of a Nobleman marry another Nobleman, ſhe will loſe the precedency due to her by her Birth, though ſhe would not have loſed it if ſhe had married a Gentleman, and the reaſon of this ſeems to be, becauſe by marrying a Nobleman ſhe receives another Feudal dignity, which ſuppreſſes the firſt.

I find it obſerved in Judge *Cook. lib.* 12. *fol.* 112. that if a *Baron* dies, having divers daughters, the King may conferr upon either of them the title; And thus the Lord *Cromwel* having died without heirs Male, *Burchier* who married the youngeſt daughter was made Lord *Cromwel*, of which we have no example in *Scotland*; for by our Law, if the title deſcend to Females by the Patent, the eldeſt onely can ſucceed to the title, but if it deſcend not by the Patent to Heirs Female, then the King may admit neither to the title, or either as he pleaſes.

After the Huſbands deceaſe, the Wife did by the Civil Law enjoy her Huſbands precedency during her Widowity, but if ſhe marry to a perſon of inferiour quality, ſhe loſes that Precedency, *L. 8. de Senat.* which holds with Us and in *England*; And yet ſometimes the King allows her the ſame Precedency, by a Letter, as he does alſo to the daughters of Dukes, and others who have loſt their Precedency by Marriage, which Letters, or Warrands, are direct to the Heraulds Office, and Regiſtrated there. And the Queen never loſes her former Dignity though ſhe marry the meaneſt perſon after the Kings death. And generally, all the priviledges due to the King, are communicated to the Queen, *per L.* 31. *ff. de Leg: Auguſta, autem Legibus ſoluta non eſt, Principes tamen eadem illi privilegia tribunut quæ ipſi habent.* Notwithſtanding whereof, Lawyers think that her Baſtards are not Noble as the Baſtards of Kings, nor does the Womb ever nobilitate. The Countrey of *Campaigne* in *France* onely excepted, where it is ſufficient that either the Father or Mother be Noble, which was allowed to the Ladies of that Countrey, upon the killing of all the Nobility at a great fight, *Papon. de Nobleſ. num.* 3. By the Civil Law alſo, a Widow living leudly, loſes her former dignity, *Arg.* § *Fin. in authent. de reſtit.* but this holds not with us, *vide Bon. de Curt. de Nobilitate, cap.* 12. *num.* 194.

It has been doubted, whether a mean woman marrying a Nobleman, retains the priviledge due to her by her Husband, who has been degraded by forfeiture, or otherwayes, and *Corbin* cites a deciſion, 27. *Auguſt.* 1698. whereby it was reſolved, that ſhe retains ſtill her former priviledge, ſince crimes are perſonal, which is alſo our Cuſtom.

It

It has been likeways doubted abroad, whether a Noblewoman marrying a *Plebeian*, and thereby losing the Precedency due to her Birth, if she marry a Gentleman in the second Marriage, she will thereby recurr to her first Dignity, the person be whom she lost the first Dignity being dead; And it was found that she will not, for in Law that which is once extinct does not revive; and therefore Women in such cases take Letters of Restitution, as they call them, or procure a warrand from the King, for that effect as the custom is with us, *ut interveniet Principis restitutio quæ plebecitatis maculam abstergat*, *Traitte de la noblesse*, *pag.* 324. But there would be no place for this question here, since with us a Noblewoman would not lose her Precedency by marrying a *Plebeian*, but the doubt behoov'd to be thus stated with us, *viz.* Whether a Noblewoman marrying a Nobleman of an inferiour degree, would recover her first dignity, she marrying thereafter a Gentleman: Or, whether a Knight-Baronets Lady marrying a Plebeian, could thereafter recover her dignity if she marry a Gentleman. For I conceive a Knight-baronets Lady, does not like a Noblewoman, retain her Precedency when she marries a person of inferiour quality, and I think neither of them would recover their former dignity without a special Warrand.

I find that the Commissioners appointed to regulate Queen *Anns* Funerals, did upon the 20. of *May*, 1619. declare, That the Ladies of the Privy Chamber should in time of mourning, take their places as if the Queen were living, till the Funerals were ended, and that the Queens Chamberers should for the present Funeral go before Countesses women, without prejudice to Countesses women, at any time thereafter.

It is fit to observe, That the Wives and Daughters of all Dukes, Marquesses, Earles, *&c.* do take the same place that the Husbands and Sons do, conform to the Precedency formerly expresst, *pag.* 35. And I find in the Heraulds Office of *England*, an establishment settled thus amongst women, by *Jasper* Duke of *Bedford*, and other Noblemen, by warrand from *Henry* the fourth.

The Wives of Dukes of the Blood Royall.
The Wives of other Dukes.
The Wives of the eldest Sons of Dukes of the Blood Royal.
The Daughters of Dukes of the Blood Royal.
The Wives of Marquesses.
The Wives of the eldest Sons of Dukes.
The Daughters of Dukes.
Countesses.
The Wives of the eldest Sons of Marquesses.
The Daughters of Marquesses.
The Wives of the younger Sons of Dukes.
The Wives of the eldest Sons of Earles.
The Daughters of Earles.
The Wives of Viscounts.
The Wives of the younger Sons of Marquesses.
The Wives of Barons, (that is to say our Lords.)
The Wives of the eldest Sons of Viscounts.
The Daughters of Viscounts.

The Wives of the younger Sons of Earles.
The Wives of the eldeſt Sons of Barons or Lords.
The Daughters of *B*arons.
The Wives of Knight-bannerets.
The Wives of the younger Sons of Lords.
The Wives of Knight-batchelours.
The Wives of the eldeſt Sons of Knights-bannerets.
The Daughters of *B*annerets.
The Wives of the eldeſt Sons of Knight-batchelours.
The Daughters of Knight-batchelours.
The Queens Maids of Honour.
The Wives of the younger Sons of *B*anerets.
The Wives of the younger Sons of Knight-batchelours.
The Wives of Eſquiers.
The Wives of Gentlemen.
The Daughters of Eſquiers.
The Daughters of Gentlemen.
The Wives of Citizens.
The Wives of *B*urgeſſes.

From all which it is to be obſerved, that the wife of the eldeſt Son of any degree, takes place before the Daughter of that ſame degree, and both of them take place of the younger Sons wife of the preceeding degree; Thus the Lady of the eldeſt Son of a Marqueſs preceeds the Daughter of a Marqueſs, and both preceed the Ladies of Dukes younger Sons: *Item*, the Wife of the next degree as a Counteſs, preceeds the Lady of the eldeſt Son of the preceeding degree as of a Marqueſs, and the Daughter of a Marqueſs.

3°. This holds not only in comparing degrees amongſt themſelves, but alſo in comparing Families of the ſame degree amongſt themſelves, as for inſtance, though the Marqueſs of *Dowglas* Lady would give place to the Marqueſs of *Huntlys* Lady, yet the Wife of the Marqueſs of *Dowglas* eldeſt Son would take place from the Marqueſs of *Huntlys* Daughter.

4°. Though of old with us in *Scotland*, the Wives of Lords did contend, that they had the Precedency from the Daughters of Earles: Yet ſince that Letter written by King *Charles* the firſt at his Coronation, we follow the cuſtome of *England*, in preferring the Earles Daughter, who takes place immediately after her eldeſt *B*rothers wife.

5°. Though the Daughter of a Marqueſs gives place to the wives of the eldeſt Sons of all Marqueſſes, yet if that Daughter be an Heireſs, and the Daughter of an elder Marqueſs, then ſhe takes place from the wives of the eldeſt Sons of all younger Marqueſſes, as *Segar.* obſerves, *pag.* 240. It is likewiſe obſervable, that ſince this Ranking under *Henry* the fourth, there are ſeveral new additions; For after the wives of Lords eldeſt Sons and Lords Daughters are Ranked, the Wives of Privy Counſellours and Judges, Wives of the younger Sons of Viſcounts, and of Lords or Barons, the Wives of Baronets, the Wives of *B*annerets, the wives of the Knights of the Bath, and the Wives of Knights-batchelours, *&c.* as in the former Liſt.

Some

Some conſiderable Queſtions concerning Precedency, Reſolved.

QUESTION I.

WHether in Competitions betwixt Kingdoms, States, and Towns, is their preſent Condition to be Conſidered, or what they were formerly?

To which it is anſwered, with this Diſtinction, *viz.* Either the Kingdom, or other places betwixt which Competitions are Stated, remain the ſame that they were in their Subſtantials, and then the former Precedency is ſtill continued; as for inſtance, Though *Rome* whilſt it was a Common-wealth did ſometimes admit of a *Dictator*, who had indeed the power of a King, yet they remained ſtill the ſame Common-wealth; and therefore being the ſame in ſubſtantials, they ought to have the ſame Degree of Precedency continued: Or when two or three Kingdoms are without any alteration United in one, as the Kingdoms of *Scotland* and *England* were United into the Kingdom of *Great Britain*, under Kings in the ſame Race, who ſucceeded to both, as is fully Demonſtrated by *Alb. Gentil. pag.* 82. and this is likewiſe clear from *l. proponebatur ff. de Judiciis & l.* 24. *ff. de Legat.* 1. But where there is a ſubſtantial alteration called by *Ariſtotle* μεταβολη *vel* παρεκβασις there the former Condition is not conſidered, but the κατεστωσα πολιτεια, or preſent condition of the places in Competition is that which ought to be conſidered: And thus when a Kingdom comes to be Conquer'd by a Stranger, and by a Strange and Forreign Nation, there the State of the Kingdom is abſolutely Innovated, eſpecially if the Laws of the State be altered: And therefore the *French* Lawyers are of Opinion, that the Precedency of *England* ought onely to be Computed from *William* the Conquerour, Becauſe, at that time a Stranger and a Strange Nation did conquer the ſaid Kingdom, and the Fundamental Laws of it were much Innovat; and if this be not an Alteration none can be: For the Antiquity of Land cannot give Precedency, for all Land was Created together, and there are few Nations ſo Conqueſt, as that the former people do not remain, ſo that there can be no Precedency upon that account, though ſome who are extravagant in their Zeal for their Countrey doe Argue its Precedency from the firſt Ages of the World; as *Vaſquius* does that of the *Spaniſh* Empire, in deryving it from *Tubal Cain, præfatio in Contraverſ. Illuſt.*

QUESTION II.

Whether a Kingdom becoming a Common-wealth, or a Common-wealth a Kingdom, does their former Precedency remain?

This Queſtion has two Branches wherein the Difficulties differ,
The firſt is, Whether that Town or Place which was a Republick,

having become a Monarchy or Principality, ought it to Retain the Precedency due to the former Common-wealth? And that it ought to Retain the ſame Precedency may be Argued, Becauſe, when one thing is ſurrogat in the place of another, that which is ſurrogat ought to have the ſame priviledge with that in whoſe place it is ſurrogat, *ſurrogatum ſubit naturam ſurrogati*; But ſo it is, that the ſubſequent Principality is ſurrogat in place of the former Common-wealth, and therefore ought to have the ſame Precedency: this Reaſon is likewiſe ſeconded by a Deciſion of *Charles* the fifth, who in the Debate betwixt the Duke of *Florence*, and the Duke of *Ferrara*, did prefer the Duke of *Florence*, becauſe the Republick of *Florence* was formerly preferred to *Ferrara*.

From this Deciſion ſome would diſtinguiſh betwixt the Caſe, where a Citizen of the former Common-wealth is preferred by common conſent of his fellow Citizens, in which caſe they who Governed formerly ſtill Govern, Becauſe they chooſe the new Duke, Prince or King: And the caſe wherein a Stranger comes in and Conquers, in which caſe the former Government is abſolutely Altered, and none of thoſe who Governed formerly continue to Govern: Nor does the Argument of Surrogation hold in this caſe, becauſe that Argument onely holds where one thing is ſurrogat to an other by common conſent, and where the Reaſon of the Priviledge pleaded in the one caſe remains in the other, neither of which can be alleadged where there is a Conqueſt; becauſe there, neither is there a Conſent, nor does the Government, nor State remain the ſame, And conſequently, ought not to have the ſame Precedency, ſeing the ſameneſs of Precedency depends upon the ſameneſs of the State, which ought to have the Precedency.

The ſame is likewiſe to be concluded, where One of the ſame City or Republick Uſurpes the Government; For in that caſe the former Arguments hold: And though *Ariſtotle libro quinto Politicorum* ſayes, *eundem Statum Reipublicæ manere, ubi rem ſuam & ſummam Reſpublicæ ante libera civi alicui ſuo regendam deinceps comittit*, παρα μικρον οτε μεν γαρ εξαπαντησαντες το πρωτον ικοταν μεταβαλλωσι την πολιτειαν. Yet this requires two conditions, The one is, that one of the Citizens Govern; and the other is, That the Government be tranſmitted to him by the common conſent of thoſe his fellow Citizens who Governed formerly; An eminent Example thereof We find in that famous *Lex Regia*, mentioned *L.1. ff. de Conſt. Princ.* whereby the *Romans* tranſmitted all the power they had to the Emperour, *quæ de Imperio lata eſt qua populus ei & in eum omne ſuum Imperium & poteſtatem contulit*, and upon this account it is, that the *Roman* Emperours pretend the ſame Precedency that was due to the Common-wealth of *Rome*, ſince the Common-wealth did ſurrender and tranſmit to them their power.

The next Branch of the Queſtion is, Whether a Kingdom being turned into a Common-wealth, ought to have the ſame Precedency that was due to the former Kingdom? And it would appear that it ought not, ſince in becoming a Common-wealth, it is Degraded from its former Dignity, Common-wealths being by the conſent of all Nations poſtponed to all Kings, or Crowned-Heads; Nor does the Argument of Surrogation hold in the matter of Precedency, where there is not onely a ſubſtantial Alteration, but a Degradation: The former Argument

gument of Surrogation does not likewiſe take place, where there has an intermediate Impediment interveened: as for Inſtance, Though *Spain* had been formerly a Kingdom, and though *England* was really a Kingdom of old, yet both theſe having become afterwards Provinces to the *Roman* Empire, they cannot Reaſſume the Dignities and Precedency due to them before they were ſubdued, and became Tributaries; ſince that Degradation was a *medium impedimentum*, as Lawyers call it, Which hindred the preſent condition of their Kingdom to be drawn back to its old State: A thouſand inſtances of which may be given in other caſes, and even in the matter of Precedency, If a Family be Degraded, and continue ſo for a long time, if though they be thereafter reſtored; Or if an Earl ſhould reſign his title in the Kings hands, and ſo extinguiſh his title, though he were reſtored, yet he would not be reſtored to his former Precedency, in prejudice of thoſe who had acquired titles *medio tempore*.

QUESTION III.

Whether he who is Elected to a Dignity, ought to have Precedency thereby, as if he were Actually Admitted?

This queſtion has been often Agitated, and may be of great Uſe amongſt perſons of all Degrees: It was firſt Debated in *anno* 1521. betwixt the Ambaſſadours of *Charles* the fifth, who was then Elected Emperour, and the Ambaſſadours of *Francis* the firſt King of *France*, who alleadged, that though *Charles* the fifth was Elected Emperour, yet not being Crowned and Anointed, the Election being but an incompleat Act, could not give him Preference; and that it could not was Argued from theſe Reaſons. 1°. Before the Emperours Admiſſion and Conſecration, he is not called Emperour, but onely King of the *Romans*, and therefore he ought not to have the place as Emperour, for the King of the *Romans* is inferiour to the Emperour, and the Inferiour cannot have the Superiours place. 2°. If Election could give the Precedency, there needed not any further Solemnity; For by the Election, the perſon Elected would be Emperour, for none can have the Emperours place but the Emperour. 3°. That which is Imperfect cannot operat as much as that which is perfect, *L. Ædificia § perfectiſſime ff. de edil. edict.* and that which is Imperfect is judged in Law to be no more, then if it were not, *Imperfectum, & nullum idem ſunt*: And therefore as he could not have Precedency, if there were no Election, ſo neither can he have it, where there is but an incompleat Election. 4°. Where there are two Degrees ſubordinat one to another, the Inferiour Degree cannot aſpire to that which is due to the Superiour; But ſo it is, that Election is but ſubordinat to Admiſſion, *Ergo*, it cannot Operat as much as Admiſſion. Notwithſtanding of all which, I find that *Gothofred.* and others decide for the Emperour, and are of opinion that an Election has in it the Radical Power and Force of Admiſſion, and ſo gives as much Precedency as Admiſſion does; Yet with Us, We ſee that an Elect Biſhop takes not the ſame place, that is due to him after he is Admitted: And therefore the Diſtinction

would be made here betwixt ſuch an Election, as transfers all the power that Admiſſion can, as We ſee in the Emperour, King of *Poland*, and others, who can receive no more Power after they are Elected, and delay their Coronation and other ceremonies for their own conveniencies; And the caſe of Biſhops and inferiour Magiſtrates, who are oft-times to receive ſome further power beyond their Election; and ſo, their Election not being equivalent to an Admiſſion, it gives not the ſame Precedency that the other can: and therefore I may conclude generally, that Precedency followes Power and Adminiſtration.

QUESTION IV.

Whether ought One who has been twice or oftner Elected to any Dignity, be Preferred to him who was onely once Elected?

The *Roman* Emperours have differed in this, for the Eldeſt and the Lateſt Emperours did think, that ſuch repeated Elections did augment the Dignity to thoſe who were Elected, and thus *Valentinian novel.* 48. and this was likewiſe *Hadrians* Opinion, as *Spartianus* Obſerves in his Life: But *Theodoſius* the Younger thought, that theſe repeated Elections did ſhew the Merit of him who was Elected, but did not augment his Dignity, *repetiti enim faſces virtutem ſepe meritam comprobant, non augent, quia nihil eſt altius* Dignitate, *L.* 1. *C. de Conſul. vid. Cujac. ad l. illam*, and with this laſt agrees *Goth. Theſ.* 28. With Us if the Precedency be determined by a voice, this holds not, as if one ſhould be Elected to be the firſt *Alderman*, and another to be a ſecond *Alderman*, this ſecond would not have the Precedency, though he had been ofttimes formerly preferred; But in dubious caſes, certainly repeated Elections do prefer: And though the Imperial Dyet has decided Precedency upon this Account amongſt Generals of an Army, to him who had been twice formerly a General, though the other had been firſt a General, as *Goldaſt.* obſerves; Yet I find it more Reaſonable, that he who was the eldeſt General, ſhould have been preferred: For that is the mark of greateſt Experience, and the not being frequently Elected might have proceeded from want of new Occaſions or of Inclination; And it were Abſurd to think, that if One had been an old General, and his Commiſſion had continued for many years, that thereafter another, though thrice Elected in a ſhorter time, ſhould be preferred to him. With Us alſo, I find that One who has been twice or ofter preferred to be *Provoſt* or *Mayor*, is preferred to him who has been onely once *Mayor*; and it is Reaſonable that they both living in one place, and being preferred by thoſe of the ſame City, ſhould be preferred in Meetings relating to the ſame City.

QUESTION V.

What Influence has the Conjunction of moe Dignities upon Precedency?

There are ſome Lawyers who think, that he who has moſt Imployments ought to be Preferred to him who has but one: And thus they ſay, That he who hath two or three Dutchies, or Earldoms, ought to be preferred to him who hath but one, Even as two or three Lights are greater then one, and two or three Cords are ſtronger then one; And for this they cite *L. Fin. Cod. de edict. d. Adrian.* and of this Opinion was *Menochius, Conſil.* 902. And for this cauſe, *Marz. Conſil.* 26. thought that the Duke of *Ferrara* ought to be preferred to the Duke of *Florence*; And *Navarrus Conſil.* 1. thought that a Cardinal who was a Chancellour ought to be preferred to an elder Cardinal who was not; And that a Doctor of the Civil and Canon Law, ought to be preferred to a meer Doctor of the Civil Law. But yet *Gothofred* is of a contrary Opinion, *cap.* 3. *Theſ.* 2. And in Our Practice the greater Dignity is preferred to many leſſer Dignities, yea, and the Elder in the ſame Dignity is preferred to him who was laſt Promoted to the ſame Dignity, though he have many leſſer Dignities joyned to it; But betwixt two Dignities that are different, if it be not known to which of the Two the Precedency is due, the conjunction of leſſer Dignities with the Dignity contraverted ought to prefer; Even as if it were doubted, which of two Bodies weighed moſt, or which of two Lights ſhined moſt, the leaſt addition to either would certainly caſt the Ballance and alter the Proportion: But if theſe many be all Inferiour to one Imployment, they ought not to be preferred, no more then many little Pearles ought to be preferred to a great one; and yet if it be doubted which of two Pearles are of greateſt Value, the addition of two or three little ones to either, will raiſe the Value of that one to which they are thrown in.

QUESTION VI.

How far do former Dignities Influence a preſent Advancement, and Determine the Precedency depending thereupon? And what Rank is due to Honorary and Extraordinary Offices?

Lawyers give divers inſtances of this, As firſt, a Judge is made a Privy Councellour, but thereafter the Preſident of that Court, where he is a Member or Judge, is admitted to be a Privy Councellour; in that caſe though the other was firſt admitted to be a Privy Councellour, yet the Preſident, though laſt admitted, will have the Precedency, and Vot firſt even in the Privy Council; Becauſe it is indecent, that a Member ſhould have the Precedency, or Vot before his own Preſident: And thus *Papon* tells Us, it was decided by the Parliament of *Paris, tit. lib.* 4. *tit.* 2. *Art.* 5. which is not unlike what *Vitellius* ſayes, *in Tacitus* 19. *Annal. Fœdum ſi de Honoris prærogativa dimicare cum ducibus audeant, ſub quorum*

ſignis ſtipendia fecerant. A ſecond caſe is, That though a Honorary or Extraordinary Officer will not be preferred to an Officer Ordinary, Yet if a perſon be a Honorary or Extraordinary Officer, before another be admitted to be an Ordinary Officer, if that perſon who was but formerly an Extraordinary Officer, be thereafter admitted to be an Ordinary Officer, he will be preferred to him who was admitted before him, though to an equal Degree; Becauſe, though he was not the firſt Officer in Ordinary, yet he is now equal in Dignity with him, and was an Extraordinary Officer before him: as for inſtance, If One be admitted to be an extraordinary Phyſician to his *Majeſty*, and thereafter become an ordinary Phyſician, he will have the Precedency from them who were Admitted in Ordinary before him, if they were admitted to be Ordinary Phyſicians after he was admitted to be Extraordinary; Precedency being to be taken in that caſe from the Time of the firſt Advancement, *L. 4. Cod. de Conſulibus*: But though this be Obſerved abroad, yet I doubt if it be Obſerved in *Britain*. A third caſe is this, There are two made Counſellors, but he who is laſt Admitted a Counſellor, is firſt Nobilitat, and therefore even as Counſellor he will have the Precedency, though the other was made the firſt Counſellor; And this was ſo decided by the Emperour *Theodoſius*, *L. unica Cod. Theodoſ. de Conſulibus*: and is in Obſervance with Us, amongſt whom the youngeſt Counſellor, being made an Earl, is preferred to elder Counſellors, and though the elder Counſellor be thereafter made an Earl, yet the eldeſt Earl will always be preferred; Though it would ſeem that upon the firſt Counſellors being made an Earl, he ought to be preferred, as in the former caſe where an Extraordinary is preferred, when he becomes to be in equal Dignity with the prior Ordinary Officer. But the Reaſon of the Diſparity is, becauſe Earles are always to preceed according to their Priority, but Officers are not, An Office being but a thing Temporary, and there being no Difference betwixt an Ordinary and Extraordinary Officer, but that the Ordinary has a Sallary, and waits more immediatly upon the King, but yet the Extraordinary Officer was truely of equal Dignity with the Ordinary. Theſe Extraordinar Officers were called *Honorarii ſeu Codicillares*, *L. 9. C. de metatis quibus citra cingulum Dignitas pro ſolo Honore delata eſt*, they had no advantage ſave the Dignity, *Nov. 70. nihil aliud niſi purum Honorem habent*, *L. 7. de Decur.* they are called *inanes umbræ & caſſæ imagines dignitatum.* I have heard this caſe alſo Stated with relation to the ſame quære, *viz.* By the Erection of the Town of *Brichen*, in a Burgh Royal the Biſhop of *Brichen* is firſt to Elect, and then the Town are to Elect their Bailies: From which the queſtion ariſes, Whether if the Biſhop chooſe One who was never a Bailie formerly, and the Town chooſe thoſe who were formerly Elected Bailies, ſhould the Biſhops Bailie preceed? It being pretended, that though he is to have the firſt Nomination, and the choiſe of all, yet that ſhould not give his Bailie or Alderman the Precedency, in reſpect that by the conſtant Cuſtom obſerved by all the Burrowes, when many are Elected to be Aldermen or Bailies at once, he who has been formerly a Bailie preceeds always him who was never.

QUESTION VII.

Whether amongſt ſuch as have equal Dignity, the firſt in time ought to be Preferred?

It is Anſwered, That Generally and Regularly the firſt in Time ought to be Preferred, amongſt ſuch as are equal in Dignity; Which is clear be the Civil Law, not onely in Kingdoms, but in all the Degrees of Nobility and Promotions: And this Our Reaſon may teach Us without Law, for if there were not ſome Certain and Stated Rule whereby Precedencies might be known, it were impoſſible to evite Confuſion, and all other Rules except this are uncertain, but yet this Rule has ſome Exceptions. 1°. Princes of the Blood, *viz.* the Sons, Brothers, Grand-ſons, and Nephews of Kings are excepted from this Rule: For though they be Dukes or Earles of a latter Creation, they are preferred to all of that Dignity. 2°. In *Germany*, if the Chief of a Family come to a Dignity, equal to one of his Kinſmen who formerly enjoyed that Dignity, he will be preferred to him, though his Kinſman did firſt attain to the Dignity; An Example whereof *Gothofred* gives *cap.* 3. *Theſ.* 16. this Exception ſeems to be founded upon the right of Blood, to which thoſe of the ſame Family ſeem to give that Reſpect as to an elder Brother; But though thoſe of the Family may give this Reſpect out of Favour, yet in Law they are not thereto Oblieged; For the Prince being the Fountain of Honour, he onely can give Preference, and his Patent may prefer one Couſin to another, ſince he can beſtow Employments which can prefer a Son to a Father: And therefore in *Britain*, the date of the Patent is onely conſidered.

QUESTION VIII.

When many are Promoted at once in the ſame Write, or when many are Nominate in the ſame Commiſſion, Whether is the Order of Nameing therein expreſt to be Obſerved?

It is anſwered, That Ordinarly he who is firſt named ought to be preferred, *L.* 1. *ff. de Albo ſcrib. Albericus ad L. inter Claras C. de ſum. Trinit.* but though this hold, where the Write wherein many perſons are named is drawn upon Deſign to Prefer thoſe who are named, becauſe, there Promotion being the deſign, It is to be preſumed that the Order of the Promotion was Obſerved, *Gloſſa. ad §. ult. Auth. de Defenſ. Civit. & Clement.* 1. *de Baptiſmo*, yet where the Write had any other deſign, and the Nomination did onely proceed by way of Narration, there an Argument from the Order of Nomination is not ſtill Concluding; eſpecially, Conſidering that ſuch as draw publick Papers, are not always verſed in caſes of Precedency, and are oft-times ſo intent upon the deſign it ſelf, that they conſider not the Order of Nomination;

And thus I have my ſelf ſeen old Charters wherein the Chancellour is oft-times placed after the Lord Chamberlain, and both of them after ſome of the Nobility; and if any man will conſider Our Statutes, wherein Commiſſions are granted, they will find this Order very ill Obſerved: And Lawyers conclude this Argument very weak in ſuch caſes, *Everard. in Topicis loco ab ordine num.* 13. *Golſtad. lib.* 1. *cap.* 23. And there are very clear Examples of this given, *cap.* 2. *de Judiciis, cap. Paſtoralis de Conceſſ. prebend.*

But yet in dubious caſes, where the Perſon injured cannot otherwiſe prove his Precedency, this ought to bear great weight, eſpecially, If many ſuch Papers can be ſhewed of one tenour; And if the Office granted by that Commiſſion gives Precedency, above what the perſons therein named could otherwiſe pretend to, then the firſt Nomination has the Precedency: As when Ordinar Gentlemen are named in the Commiſſion of the Privy Council, *&c.* I find alſo by the old Records of Parliament and Privy Council, that the Members of Parliament and Counſellours are in the Sederunts named as they entered into that particular Meetings, but now they are named according to their true Precedency.

QUESTION IX.

In what caſes does Age prefer, and what is its Prerogative in the matters of Precedency?

The Conceſſion of the Prince being the Rule of Honour, he who has the firſt Conceſſion ought to be preferred in the matter of publick Honour, except in three caſes obſerved by *Gothofred. cap.* 3. *Theſ.* 14. Firſt, in caſes dubious. Secondly, where the pretences are abſolutely equal; And thus of the two *Roman* Conſuls, the Eldeſt always preceeded, as *Plutarch* obſerves. Thirdly, to take away Contraverſies amongſt perſons of the ſame Family, but of different Lines. It is obſerved in *Germany* and other places, that the Eldeſt has always the Precedency, as *Golſtad* and other *German* Authours obſerve; And this laſt holds likewiſe with Us, if the Precedency be not clear, and was ſo decided by King *James* the ſixth. betwixt *Blair* of that ilk, and *Blair* of *Balthaiock*.

QUESTION X.

Whether does Appearancy of Blood give Precedency before actuall Inveſtiture and Poſſeſſion?

Though it may ſeem, that ſince *Marquiſats*, *Earldoms*, &c. being Feudal Honours, conferred oft-times by erecting Lands in a Marquiſat or Earldom, that therefore till the apparent Heir be actually Inveſted, or Infeft as We call it, he ought to have no Precedency; Yet that being expreſly Debated, in *anno* 1608. in the caſe of *Frederick* Duke of *Wirtemberg*,

it

it was decided, that the very right of Blood tranſmitted the Precedency: But *Golſtad. Coment. de Reg. Bohem. lib.* 3. *cap.* 6. is of opinion, That though this may hold where the apparent Heir ſought to be Inveſted or Infeft, and his not being Entered nor Infeft was not his Fault; Yet if he did not ſeek to enter, he ought not to have the Precedency: With Us though an apparent Heir never enter, yet he has ſtill the Precedency due to his Predeceſſor.

QUESTION XI.

Whether does the apparent Heir his Aſſuming and Uſing the Title and Precedency of his Predeceſſor, make him lyable to his Predeceſſors debts, and Infer a Paſſive Title againſt him, as We ſpeak?

To this it is anſwered, That it makes him not Lyable, in payment according to the preſent Curent of Our Deciſions, becauſe Honour deſcends from the King, and is not any lucrative Acceſſion, out of which Debt may be payed, and no man ſhould be made lyable to Debts for enjoying that which cannot pay Debts: Nor does the Son poſſeſs this Title by his Father, but by his Family; And Lawyers have reſolved that *Filius retinet Nobilitatem etiam repudiata hæreditate, Bart. in L. Jurisjur.* § 1. *ff. de Oper. lib. Jac. & in L. ſi non ſortem ff. de condict. in debit.* But yet this deciſion may ſeem unſuteable to the Analogy and Principles of Law, For 1°. Since Honour is by the firſt Patent and Erection granted to a man and his Heirs, It ſeems Juſt and Legal that none can enjoy the ſame, but ſuch as are Heirs; ſo that this ſeems to be a qualified Right granted by the King, and conſequently, can be enjoyed by none but ſuch as Purge and Purifie the qualities and are Heirs. 2°. We ſee that in other Rights granted to a man and his Heirs, no Succeſſor can have Right without being Heir, and ſince this holds in Acceſſions of the meaneſt Nature, Why ſhould it not much rather hold in Titles and Dignities which are things of great importance? 3°. We have no way nor method to know who is Heir, but by an Inqueſt, after which he who is ſerved Heir is lyable to all Debts, and if he who is to uſe the Title, needs not be found Heir by an Inqueſt, any man may uſe the Title of a Deceiſt Peer, and if two contended for it, this could not be tryed without an Inqueſt and Service. 4°. The making men lyable to their Predeceſſors Debts for uſing his Title, would be very advantagious for the Defuncts Creditors, and it is the Intereſt of the Common-wealth that Creditors ſhould be payed; nor could the apparent Heir complain, ſince he may chooſe to uſe the Title or not as he pleaſes. 5°. It were advantagious to the Common-wealth that none had a Title, but he who had the Eſtate which was given out with it, and out of which it was to be mantained, a Poor Nobility being a great burden upon a Common-wealth and a ruine to it: And I find that the Parliament of *England* did Degrade *George Nevil* from being Duke of *Bedford*, for want of an Eſtate ſuteable to his Dignity, which *Statut.* 17. *Ed.* 4. expreſſes the inconveniencies here mentioned, which are greater in *Scotland* than in *England*, becauſe Our Peers have more Intereſt

in laying on Taxes than Lords in *England* have. 6°. The Law conſiders not in other caſes, whether the thing uſed by the apparent Heir, may be advantagious to him, Or whether he may pay Debt with it, for the uſing of meer Ornaments, which can yeeld no Money, Or things of the meaneſt advantage, do make him lyable, yea, and he would be lyable though he were a looſer by the thing he uſed; whereas not onely are Honours and Precedency things of great Advantage, and which men would buy at any Rate; But if a man have Liberty once to uſe the Title of his Predeceſſor, it gives him a great Opportunity to inhance his Predeceſſors Eſtate by indirect means: And the former Arguments prove onely that the Blood intereſt as to Honour is tranſmitted without a Service, but not that the Feudal Title of Earl can be ſo tranſmitted.

QUESTION XII.

Whether does the Appearancy of Blood give Precedency, where the Predeceſſor is not Dead?

This is called by the Doctours, *Spes & expectantia ſucceſſionis* κληρονομια κατ' ελπιν and upon this account it is Debated, Whether the Son of a King ought to be preferred to his Brother and all the Peers? And generally, whether the Nephew ought to be preferred to the Uncle who was his Fathers ſecond Brother? And I find it Recorded that *Lycurgus* did decide for himſelf againſt his Nephew, being the Son of his eldeſt Brother: But I would diſtinguiſh here thus, Firſt in the Families of Kings and Princes, all the Kings Children are preferred to the Kings Brothers, and all the Kings Brothers to the Kings Uncles, and thus it was decided in *France* by *Henry* the third, *Rupanus pag.* 508. But formerly the Uncles were preferred by the Conſtitution of *Philip* the *Long anno* 1316. And though in the *Roman* Empire before *Alexius Comnenius* the Emperours Son was ſtill preferred to his Uncle; Yet that Emperour deſiring to put a Mark of Reſpect upon his own elder Brother, preferred him to his Son, and now the Sons of Princes are ſo farr preferred, that not onely they, but all the Princes of the Blood are preferred to all other Peers, though they be laſt Created, as was found by the Parliament of *Paris*, *anno* 1541. betwixt the Dukes of *Neveres* and *Monpenſier*. 2°. If in other Families the Brother be of a Dignity equal to his elder Brother, then the Brother will be preferred to the Nephew; as if the Brother be an Earl, and the Nephew a Lord as being an Earles Son, in this caſe Expectation will not prefer the Nephew, becauſe there are other actual Degrees of Preferrence. 3°. If the Uncle were a Lord by Creation, and the Nephew a Lord by Birth, in which caſe, if the Uncle was a Lord before the Nephew was born, the Uncle ought to be preferred as firſt in Time, but not if the Nephew was firſt born, and thus *Baldus* diſtinguiſhes, *ad L. ut inteſtato C. de ſu. & Leg. Hered.* 4°. If neither the Nephew nor Uncle have any ſpecial Dignity, then the Son of the elder Brother is to be preferred to the Uncle; And this laſt caſe ſhews, that the immediate hope of Succeſſion, or *jus expectantiæ*, is in it ſelf a ground of Precedency, and ſince a man and his appa-

apparent Heir are *una & eadem Perſona* in the Conſtruction of Law, and that in many things that are Diſadvantagious to the Son, he is look'd upon as Heir apparent, in the ſame way as if his Father were dead; it is therefore juſt, that as he has the Diſadvantages of an apparent Heir, ſo he ought to have the Advantages of an apparent Heir: And thus We ſee that Our Statutes having Declared Compriſings bought in by the apparent Heir to be Redeemable by the Defuncts Creditors, It was found that a Compriſing bought in by the eldeſt Son, even whilſt his Father lived, was Redeemable from him and that he was an apparent Heir, in the conſtruction of Law; And therefore ſince the Law puts him in the ſame caſe, as if the Father were Dead, he ought to have the ſame Precedency, and conſequently ought to be preferred to his Uncle, to whom he would certainly be preferred, if his Father were dead. It is remarkable that in *Scotland*, the Uncle was of old acknowledged to be King during not only the Pupillarity of his Pupil; but during the Uncles own Natural Life, which being an Invaſion upon the Natural Right of Our Kings, was abrogated under *Kenith* the third.

QUESTION XIII.

Whether ſhould an elder Brother, who was Born before the Father was Preferred to the Dignity of a King, Marqueſs, Earl, &c. be Preferred to a younger Brother who was Born after his Father had attained to either of theſe Dignities?

Lawyers have varied very much in this Point, For ſome have been of Opinion, that thoſe that are born before the Dignity was attained, cannot pretend to the Precedency due to the Father, for he cannot be ſaid (ſay they) to be the Son of a King, or Marqueſs, whom a King or Marqueſs did not beget; And ſince thoſe who are born before a Crime is committed, looſe not their Dignity by the Fathers committing of the Crime, So by the Rule of Contraries, he who was Born before his Father was Advanced to a Dignity, ought not to participat of that Dignity: This they found likewiſe upon expreſs Laws, *L. ſi Senatus Cod. de Dignitat. L. Imperalis Cod. de Nupt.* and thus *Darius* was preferred to be King of the *Perſians* to *Artabazanes*. Others do more juſtly conclude, that theſe are to be Preferred though Born before the Dignity was obtained; For, if he who was Born in that Condition can be called the Kings Son, he muſt be the Kings eldeſt Son; And it were very abſurd that the Father ſhould be Noble, and the Son not; And if a King had but one Son, he could not be King if this were allowed: and this is moſt clear *L. Senatoris Filium ff. de Senat.* where it is ſaid, That he is aſwell to be called the Son of a Senator, who was Begot before the Father was a Senator, as he who was Begot after; And though this be true as to Succeſſion, and as to the Degree of Nobility in general, yet many Lawyers are of Opinion, that they do not attain to ſo eminent a Degree of Nobility, as if they had been Born after the Father attained to his Nobility; For by the former Law, *ſi Senator natus ex illuſtri ante Dignitatem adeptam, eſt clariſſimus; ſolum natus poſtea, illuſtris*: Others there are who ſay, That theſe who were Born before, may ſucceed

t) Honours which deſcended from old Predeceſſors, but thoſe which were acquired in the Fathers own time, ſhould onely deſcend to ſuch as were Born after theſe Honors were acquired. But now generally in *Europe*, and particularly with Us, even thoſe who were Born before the Father attained to any Dignity, do participat of his Dignity, as if they had been born after the ſame was acquired in all caſes.

QUESTION XIV.

Whether ought a Son who is in publick Imployment and Dignified, to Preceed a Father who is not?

It is anſwered, That a Son being in publick Imployment ought to preceed a Father who is not. And thus *Fabius Maximus* commanded his Father, to light down from his horſe, when he was to meet him; and was praiſed for maintaining the Dignity of the *Roman* Empire in this caſe: And the Son in this caſe is not a private perſon, but Repreſenrs the Prince or Common-wealth, who are to be preferred to any perſon; and therefore *Laurentius Celſi* was juſtly taxed at *Venice*, becauſe he would not meet his Son when he was newly made Duke of *Venice*, leaſt by being diſcovered before him he ſhould leſſen the Perogative of a Father.

But it may be doubted, Whether though this hold in Employments, it ought to hold in Titles, ſince in theſe the Son Repreſents not the Common-wealth; And therefore in theſe caſes the Laws of Nature ought to prevail above the Laws of Honour, eſpecially, if there be none preſent but Father and Son; But if there be a third perſon preſent who will take the place from the Father, but not from the Son, then the Son muſt preceed the Father; becauſe, though he yeeld to his Father, yet he ſhould not yeeld to a third Party: And it is a general Rule in matters of Precedency, that I muſt preceed you, if I preceed him who preceeds you, which is not unlike that Maxime uſed in other parts of Law, *qui vincit vincentem me, vincit me.*

QUESTION XV.

Whether may he who has the Survivance of Imployment, challenge any Precedency upon that Account?

To this it is anſwered, That he cannot Claim any Precedency: For, though there be there the hope of Succeſſion, and that the perſon to ſucceed be in *actu proximo*, and that likewiſe it may ſeem that he is advanced to a Dignity, and ſo ought to have a Precedency ſuteable to it, and that it may likewiſe ſeem fit for the Intereſt of the Commonwealth, that theſe ſhould be Reſpected and Preferred who are marked out for the Service of the Common-wealth; Yet Law nor Cuſtom have given them no Precedency, for ſince they have actually no Dignity nor Power, they ought to have no actual Precedency: And thus it was found by the Parliaments of *Paris*, and *Tholouſe* in *anno* 1551. & 1560. that theſe who had Survivances were

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onely to be preferred, according to the dates of their actual Admiſſion; And ſo theſe who were Admitted to be Councellours or Judges, after they got their Survivance, ought to have the Precedency from them, if they did actually adminiſtrate before them, *vid. Maynerd Notabil. queſt. cap.* 72. *Math. de afflict. deciſſ. Neapolitan.* 1.

QUESTION XVI.

Whether does the Daughter of a Lord, who would himſelf have been an Earl if he had lived, take place from the Daughter of a younger Earl.

It may be alleaged that the Daughter of the Lord ſhould not preceed, becauſe, an Earles Daughter ſhould ſtill preceed a Lords Daughter, and this Ladies Father was never an Earl, nor are We to conſider futur Honours in the matter of Precedency; And as ſhe would not take it in her Fathers time, ſo neither ought ſhe after his death: And as her Father himſelf, being a Lord though an Earles Son, would not have taken place from the younger Earl, ſo neither ſhould the Lords daughter from the Earles daughter, he being a younger Earl then that Lords Father: And I find by the Heraulds Records in *England*, that Sir *Thomas Lees* daughter got a Warrand from the King, to take place as a Lords Daughter, her Father having died before his Father the Lord *Lee*, which proves that ſhe could not have taken place otherwiſe, and this is commonly receiv'd in *England*. But yet it may be Debated, That the Daughter of that Lord ſhould have the Precedency, ſince her Father would have been an elder Earl; And though ſhe could not take place during her Grand-fathers time who was the elder Earl, yet *per jus accreſcendi*, and the right of Repreſentation, ſhe comes after her Grand-fathers death, to be the Daughter of the elder Earl, for Honour is but a part of Succeſſion; and therefore as ſhe might have right to her Fathers Succeſſion, if ſhe have not Brothers, ſhe may by the ſame reaſon have Right to the Honours: And it were very ridiculous to Argue ſo, as that her elder Brother (if ſhe had any) might take place as an Earles Grand-child, and that ſhe could not take the ſame place as his Siſter; and conſequently, ſince he would take the place of that younger Earl, ſo ſhould ſhe of that younger Earles Siſter or Daughter: And the Reaſon why ſhe comes to a higher Degree of Precedency by the death of her Grand-father is, becauſe by the right of Repreſentation her Fathers Family comes in the Grand-fathers place. And to ſhew, that this Argnment, *viz.* Your Father had not the Precedency of me, therefore you cannot have it of my Daughter, is a weak Argument in caſes of Repreſentation, may appear from this, That if it were a good Argument, the younger Earl might aſwell ſay to that Lords Son, Your Father never took the place of me, ſo neither can you; And though it may be Anſwered to this Argument, that the Diſparity betwixt the Brother and Siſter lieth in this, That the Son Repreſents the Grand-father, but the Daughter does not; Yet if We conſider it nearly, even this Anſwer is Fallacious: For though the Daughter Repreſents not the Grand-father, yet the Fathers Family Repreſents the Grand-fathers, and ſo participats all the Honours of the Grand-

fathers Family by that Repreſentation; And as the elder Brother becomes an Earl, Becauſe, if his Father had lived he had been an Earl, ſo ſhe ought to have the Precedency as an Earles Daughter, becauſe her Father would have been an Earl for the ſame Reaſon.

QUESTION XVII.

Whether if the elder Brother be Mad or Dumb, &c. does the ſecond Brother get the ſame Precedency, as if his Brother were dead?

I have heard this caſe much Debated, ſome Contending, That ſuch as were Incapable of ſucceeding, were to be Reput as dead, *& per cap.* 1. *an Mutis Surdis*, it is expreſly declared, that ſuch as are born Deaf or Dumb, or are naturally Idiots ſhall not Succeed: But others thought that even theſe are to Succeed, but have onely their neareſt Agnats given them for Curatours, and ſo they are Heirs; And conſequently, the Precedency is not due to their neareſt Friends during their Life, and they may have children who would exclude their neareſt Agnats. I find ſome Lawyers diſtinguiſh betwixt ſuch Defects as are Natural, and follow the Havers from their Birth, and theſe Defects do Exclude from the Succeſſion, ſo that the next Heir has the ſame Precedency, as if his elder were dead, if the Succeſſion be of Kingdoms, or Fews that have a Dignity annexed to them: But in private Rights, and where the Defects are Accidental, they aſſert that the Right remains with the Heir though *defectuus*, and conſequently he retains alſo the Precedency, *Tiraquel. quæſt.* 23.

QUESTION XVIII.

Which of two or moe Twins ought to Preceed, when it is Contraverted which of them was firſt Born?

We have a remarkable inſtance of this, *Gen.* 38. where the Mother deſired the Scarlet threed to be bound about his wreſt who ſhould be firſt Born, and as to this point Lawyers have differed very much, For ſome think that the Eſtate ought to be devided amongſt the Pretenders, if it be diviſible of its own Nature; Or if it be indiviſible the Superiour may prefer either he pleaſes, if the Succeſſion be of a Few; Or the Deciſion may be referred to Lot in privat Perſons; Or to the Vote of the Repreſentatives of the Kingdom, if the Succeſſion be to a Monarchy. Some likewiſe are for the Brothers poſſeſſing by turns and alternately: and though one Witneſs be not ſufficient generally to Eſtabliſh the Right of Succeſſion, yet if any one Woman was onely preſent, her Teſtimony would certainly prefer either, neceſſity forming it ſelf into a Law here as in other caſes, *vid. Tiraquel. de Jur. primi Gen. quæſt.* 17.

QUESTION XIX.

Whether do Natural Children Born before a Lawful Marriage preceed? And ſhould they be preferred to the Children Born in a Lawful Marriage, if they be Legitimated thereafter?

This caſe did exiſt in a moſt illuſtruous inſtance in *Scotland*: For King *Robert* the ſecond having begot a Son upon *Elizabeth Mure*, he thereafter Married *Eupham* Daughter to the Earl of *Roſſe*, and had by her the Earles of *Strathern*, and *Athol*; after which having married the ſaid *Elizabeth Mure*, that Marriage did Legitimate her Children, and by Act of Parliament her Children were, by a Recognition and acknowledgement of Parliament, preferred to the Children Born in the Lawful Marriage. The Reaſons *pro* and *contra*, urged in that Debate at that time are now unknown; But the Arguments which might have been urged in the caſe, are, 1°. That a Son ſo Legitimated would ſeclude without all Contraverſie all Uncles, and other Agnats, Therefore by the ſame he ſhould Seclude his other Brothers, § *ſi quis autem defunctis Authent. quibus mod. nat. cap* 1. *qui Filii ſunt legit.* 2°. Legitimation is Retrotracted and drawn back to the time of the Nativity, *cap. tanta qui fil. ſunt legit.* and Legitimation puts the Perſon ſo Legitimated in the ſame Condition as if he had never been a Baſtard, *L. ſi quis Filio* § *pen. ff. de injuſt. Teſt.* and this is beſtowed as a particular Reſpect upon Marriage and its Sacred Character, and to invite men to make Satisfaction for the wrong they have done. 3°. By the *Roman* Law thoſe that were born in Captivity were not capable of Succeſſion, but how ſoon they were Ranſomed and had returned, they were reſtored to the Right of *primo-genitor*, and preferred therein to thoſe who were thereafter born at *Rome*: And therefore ſince ſuch was the Force even of a Civil and unreaſonable Fiction, much more ought greater Force to be allowed to Legitimation, which is founded upon ſo Juſt and Pious Principles. 4°. *Quo-ad* the Right of Succeſſion, the time of the Defuncts death to whom he is to ſucceed, does regulat the quality of the Succeſſion: And therefore ſince the Perſon Legitimated was capable of Succeſſion the time the Defunct died, and was then likewiſe the eldeſt, he ought to Succeed as eldeſt, whatever his Condition was the time of his Birth, *L. poſt Conſanguineos* § *proximam ff. de ſuis & Legit. nec enim prius debet de cujuſque conditione queri quam hæreditas vel legatum ad eum pertineat, L. in opportet. ff. de Legat.* 2. 5°. The eldeſt Son was always eldeſt, and was onely hindred from this Right of *primo-genitor* and Precedency, by the Legal imperfection of his Birth, and therefore this impediment being removed by the ſame Law which put it, his Birth-right continues intire.

But whether this Priviledge ſhould be granted to ſuch as are Legitimated by the Prince, and not by the ſubſequent Marriage, may be doubted? And I incline to think it ſhould not, becauſe the ſpecial Reaſon of the former Conceſſion depends upon the Favour and Honour of Marriage; and this is likewiſe clear, *cap. & quoniam Auth. quib. mod. nat. vid. Imolam. in cap. Grand. de ſup. negl. Prælat.* And my ſecond Argument is, That

the Prince cannot by any deed of his prejudge third Parties; But here ſuch a Legitimation, would prejudge the Children of the intermediate Lawful Marriage.

QUESTION XX.

Whether ought the Order of the Nomination to be Obſerved in Commiſſions, where the Perſons are Ranked otherwayes then can be conſiſtent with the Kings former expreſs Grants?

An inſtance of this may be given in this caſe, *viz.* The *Mayor* or *Provoſt* of a City being Patron of a Colledge within their own Town, His *Majeſty* grants a Commiſſion for viſiting that Colledge, wherein he names firſt the Biſhop, then the Mayor, *&c.* The queſtion may be moved whether the Biſhop ought to preceed, becauſe he is firſt named; or the Mayor becauſe he has moſt intereſt, being Patron, Who may likewiſe alledge, that the Biſhops Nomination proceeded onely from the Ordinary Cuſtom of naming Eccleſiaſticks firſt.

As alſo, If in a Commiſſion of Juſticiary, three Lords of the Seſſion being named, and the youngeſt of the three being firſt named in the Commiſſion, It may be doubted, whether the Seniority formerly acquired in the Seſſion ought to be Obſerved, and give Precedency in Sitting and Voting; or if they ought to Sit and Vote, according as they are named in the Commiſſion: And it may be alledged that the Seniority in the Seſſion ought to be Reſpected, there being a right of Precedency thereby acquired, which cannot be prejudged by a Nomination, which might have proceeded upon miſtake; ſince it is not to be preſumed that His *Majeſty* would Degrade any whom He continued otherwiſe in ſo eminent a Dignity: And as if two Brothers were named in a Commiſſion, the elder would ſit and vote firſt, though the younger were firſt named, that inverſion being preſumed to proceed from Errour; ſo ought the ſame to be obſerved amongſt Judges who are in effect Brothers. Some likewiſe uſe to Argue in ſuch caſes from the reiterated Order of Nomination, and think that if the Perſons Commiſſionated be oft named after the ſame Order, that the Order of Nomination in that caſe is preſumed to have proceeded from an expreſs Deſign of giving Preferrence, and this they call *argumentum a geminatione actuum*; But in my judgement it is no infallible Argument, for theſe Repetitions proceed in courſe.

QUESTION XXI.

In the Competition betwixt two who are Advanced at the ſame time, but in different Writes, As if two Patents were ſubſcribed by His Majeſty *to two ſeveral Earles on the ſame day, which of the two were to be preferred?*

In anſwer to this, It is generally concluded, that though both be granted on the ſame day, and in the ſame hour, the Priority of His *Majeſties*

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Subſcription would prefer him in whoſe Favours His *Majeſty* did firſt ſuperſcrib; which may be cleared by His *Majeſties* own Declaration, for he being the fountain of Honour, he is the onely fit Judge in all Controverſies concerning it, or if his *Majeſty* do not remember, the Declaration of His Secretary is undoubtedly to be believed, *nam in his quæ attingunt offiium, officium gerentibus eſt credendum*; But if both His *Majeſty*, and His Secretary were dead, ſome think that there were place left for the ſucceeding King to gratifie either, ſince the compleating of Rights depends abſolutely upon him, who is the firſt Granter: And by the Feudal Law, and Ours, if Reſignation be made at the ſame time in the Superiours hands, in favours of ſeveral Perſons at the ſame time, *locus eſt gratificationi*, as *Craig* alſo tells Us, and he may prefer either as he pleaſes.

Some contend that where ſeveral Patents are granted in the ſame day, the King may prefer either, though it be known which of the two Patents were firſt ſigned and ſuperſcribed: For in Law, where the difference of time is ſo little, the Law looks upon it as no Difference at all, *nam de minimis non curat prætor*, and *Albericus* who has write a Treatiſe *de minimis*, is of this Opinion, and We ſee that the Law in other caſes brings in equally ſuch as approach ſo near one another in time, nor can the King be ſaid to be *functus officio*, and to have denuded himſelf of the power of Preference, where the right of Preference is ſo ſmall; as when the King ſuperſcribes both the Patents at the ſame time, as that he does not intermix any other buſineſs, *nec divertit ad alium actum*, there indeed it ſeems that neither can claim Preference by the Priority of Signing, ſince it appears His *Majeſty* had no deſign of Preferring the one to the other, and papers are ordinarly preſented to him by accident, as they fall in courſe. It may then be alledged, that in ſuch dubious caſes, where Preference cannot be known from the ſuperſcription of the Patents, and where His *Majeſty* does not Declare the Preference by any poſterior Act, but leaves both Parties to the Common Law, that there he who had the Precedency before theſe Patents ought to be continued in the Preference, ſince in all dubious caſes the Law ſtill prefers the Poſſeſſor, *& ſemper in caſu dubio pro poſſeſſore reſpondendum*; Nor can it be imagined that His *Majeſty* deſigned to Degrade a perſon whom He hath actually Preferred; But ſo it is, that to poſtpone a man to him to whom he was formerly preferred, is ſomewhat to Degrade him: And ſince Accumulation and Conjunction of Titles has very many effects in the caſe of Preference, the leaſt effect it can have, is to prefer the Haver in ſuch a dubious caſe.

I likewiſe conceive, That if two Patents were given at the ſame time, One to a Perſon who had ſerved His *Majeſty*, and much more to an actual Domeſtick, and the other to a Perſon who had not ſerved, nor were no Domeſtick, that in theſe caſes he who had ſerved, or were a Domeſtick would be preferred, becauſe of the preſumed affection of the Prince, and the former Service of the Receiver.

QUESTION XXII.

Whether is Precedency to be Ruled according to the date of the Proviſion, Inveſtiture, or actual Poſſeſſion?

There are three ſeveral times from which ordinarly Precedency is computed, The firſt is the time when the Honour is firſt granted, which is called by Lawyers *tempus proviſionis*, If the Advancement be of one ſingle Perſon to a ſingle Dignity; or *tempus Cooptationis*, if the Perſon Advanced be aſſociated into any Society, as to be One of moe Judges, *&c.* The ſecond period of Time, is the time of the Inveſtiture, as when a Nobleman is brought in in his Robs. The third is, the time when he apprehends actual Poſſeſſion.

Theſe who write upon this Subject do conclude, That Precedency is to be given not from the time of Promotion or Proviſion, but from the entry to Poſſeſſion, ſo that he who is laſt Provided or Dignified will have Precedency, if he firſt actually apprehended poſſeſſion, *Bald. in cap. cum olim. de conſuetud. Gothofred. de Preced. cap.* 3. *num.* 18. and thus he obſerves the Courts of *Rome*, *Paris* and *Tholows* to have decided, and for this he cites *l. ult. ff. de Excuſat. Tutor. l.* 1. *Cod. Theod. quis in Grad. Prefer.* and ſince Adminiſtration is the end of that Advancement, the Act is not Compleat till then.

Though this hold in Honours which require Adminiſtration, ſuch as the being in a Judicatory, *&c.* Yet it holds not in Honours where no Adminiſtration is requiſit, And thus, if two be Advanced to be Earles, he whoſe Patent is firſt paſt the Kings hand will have the Precedency, though the other ſerve in the firſt Parliament, or be preſent there a day before the other, or have his Patent firſt Regiſtrat; for it is the King, and not his Clerk, that makes Noble, but yet this is Debated by *La Rocque, cap. 66.* Lawyers likewiſe Obſerve that the former Rule, preferring him who has firſt Served to him who was firſt Provided or Inveſted, holds good, though he who was firſt Provided or Inveſted was not *in mora*, and did not delay to take Poſſeſſion, but was hindred by ſome extrinſick Impediment, ſuch as Sickneſs; And this they ſay was decided the 27 of *April*, 1594. *in Rota Romana*, and this is obſerved to be the common Opinion by *Gonzales ad regulam* 8. *Cancel.* and this they prove by the Analogy of other Feudal Rights, which being to be compleated by Poſſeſſion, the Law conſiders not whether the Party who ſhould have poſſeſt was hindred from attaining to Poſſeſſion, but who firſt attained to Poſſeſſion.

QUESTION XXIII.

Whether does the Dignity of him who beſtows the Honour, Regulate the Precedency that is beſtowed among Equals?

It is anſwered, That it does, all other things being Equal; and thus thoſe

thoſe who have the ſame Dignity from a King, as for inſtance, Thoſe who are made Knights by a King are preferred to thoſe who are made Knights by a Common-wealth; And amongſt Common-wealths, thoſe who are made Noble by the greater Common-wealth are preferred, to thoſe of the ſame Degree made Noble by a leſſer Common-wealth, *Gloſſ. ad L. 2. de Alb. ſcribend. Menoch. Conſil. 126. Lauderus de Dignitat. Concluſ. 32.* and this holds ſo farr, that the youngeſt Knight admitted by the one is preferred to the eldeſt admitted by the other: But Knights admitted by a Commiſſioner, are not upon this account to be poſtpon'd to thoſe made by the King himſelf, ſince they are in the Conſtruction of Law admitted by the ſame Dignity, *& qui facit per alium, facit per ſe.*

It is very obſervable, that the *French* King prefers the Dukes made by the Emperour, not onely to the Dukes made by himſelf, but even to the Ambaſſadours of Forreign Kings; though I think this is allowed onely to theſe Dukes, who are Sovereign Princes. By this rule likewiſe it is, that the Clerks of a Superiour Court are preferred to theſe of an Inferiour, ſince they derive their power from a higher Juriſdiction.

QUESTION XXIV.

Whether can a Prince Nobilitat any of his own Subjects in the Territories of another Prince?

It has been Argued that he cannot; becauſe he cannot beſtow Honours, but where he is a Prince, but ſo it is, that he is not a Prince, at leaſt hath no power in the Territories of another Prince: Which Opinion ſeems to be founded on *L. ult. ff. de Off. præfect. Urb.* and therefore *Sigiſmund* the Emperour having deſigned at *Lions* in *France*, to Great the Earl of *Savoy*, Duke of *Savoy*, he was reſiſted by the Governour of *Lions*, till the *French* King ſhould be advertiſed; And *Charles* the fifth having whilſt he was Emperour, Created ſome Lords and Knights in *France*, though at the deſire of *Francis* the firſt the *French* King, their Creation being thereafter Contraverted by their Peers, It was found Illegal: But yet I incline rather to *Noldus*'s opinion *de Nobilitate c. 2.* who thinks that a Prince may Exerciſe any Voluntar Juriſdiction without his own Dominions, eſpecially in Relation to his own Subjects, *L. 1. ff. de Officio pro Conſul. Bartol. in L. 1. Col. 9. La Rocque triact de la nobleſſe, c. 76.* and if they ſhould attempt againſt his Life, they would be guilty of Treaſon, though the attempt was made in a Forreign Nation. Lawyers likewiſe have allowed to Princes all manner of Juriſdiction, even within the Dominion of others: And therefore I much admire, how theſe Honours that were beſtowed by *Charles* the fifth, could have been thereafter contraverted, if the perſons to be Dignified were the Emperours own Subjects; but I believe they were not.